Supreme Court, U.S.
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In The

Supreme Court of the United States

IN RE ROBERT B. SURRICK,

Petitioner.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of due process to suspend an attorney from practicing law for conduct that was not a known cause for suspension at the time the conduct occurred?

2. Is it a violation of due process to conduct an evidentiary hearing under one rule of conduct and burden of proof, but suspend an attorney from practicing law by retroactively applying a different rule of conduct and burden of proof without affording a new evidentiary hearing?

LIST OF PARTIES TO THE PROCEEDING BELOW

Robert B. Surrick, Esq., was the only party to the proceeding before the United States Court of Appeals for the Third Circuit. He is an individual, a citizen, and a resident of Pennsylvania and was so at the time the disciplinary proceedings in this matter were commenced.

The United States Court of Appeals for the Third Circuit appointed Howard J. Bashman, Esq., to file a brief as amicus curiae in support of the Order of the United States District Court for the Eastern District of Pennsylvania suspending Mr. Surrick from the practice of law before the district court for thirty months.

The United States District Court for the Eastern District of Pennsylvania invited the Office of Disciplinary Counsel of the Pennsylvania Supreme Court's Disciplinary Board to participate in the reciprocal discipline proceedings before the district court, and Office of Disciplinary Counsel's participation in this matter was limited to those proceedings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	12
I. THE THIRD CIRCUIT'S DECISION IS INCONSISTENT WITH THE DUE PROCESS CLAUSE AND DECISIONS OF THIS COURT	12
A. Retroactive Application Of A New Rule Of Conduct Denied Petitioner Fair Notice Of The Charges Brought Against Him	12
B. Retroactive Application Of A New Rule Of Conduct Denied Petitioner Fair Notice That His Conduct Was Impermissible	18
C. Retroactive Application Of A New Burden Of Proof Denied Petitioner Fair Notice of His Evidentiary Burden	20
D. Application Of A New Standard Of Conduct And A New Burden Of Proof To The Earlier-Compiled Evidentiary Record Denied Petitioner The Opportunity To Be Heard	22

TABLE OF CONTENTS – Continued

Page

II. THIS CASE PRESENTS QUESTIONS IMPORTANT TO THE PUBLIC INTEREST..... 24

CONCLUSION..... 28

TABLE OF AUTHORITIES

Page

CASES

In re Anonymous No. 39 D.B. 90, 14 Pa. D. & C. 4th 65 (1991) 20

In re Application for Disciplinary Action Against Hoffman, 670 N.W.2d 500 (N.D. 2003) 26

Bar Ass'n of Balt. City v. Posner, 339 A.2d 657 (Md. 1975) 26

In re Berlant, 328 A.2d 471 (Pa. 1974), *cert. denied,* 421 U.S. 964 (1975) 15

Bouie v. City of Columbia, 378 U.S. 347 (1964) 13, 16, 17, 18, 19

Bridges v. California, 314 U.S. 252 (1941) 27

In re Brown, 416 P.2d 975 (Ariz. 1966) 26

Brown v. Hammond Assocs., 810 F. Supp. 644 (E.D. Pa. 1993) 14

Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) 21

Clemente v. Espinosa, 749 F. Supp. 672 (E.D. Pa. 1990) 14

Commonwealth ex rel. Buckingham v. Ward, 103 S.W.2d 117 (Ky. 1937) 27

Copren v. State Bar, 183 P.2d 833 (Nev. 1947) 26

Disciplinary Bd. of Hawaii Sup. Ct. v. Kim, 583 P.2d 333 (Haw. 1978) 26

Disciplinary Counsel v. Barnett, 745 N.E.2d 1034 (Ohio 2001) 26

Disciplinary Matter Involving Triem, 929 P.2d 634 (Alaska 1996) 26

TABLE OF AUTHORITIES – Continued

Page

Fla. Bar v. Rood, 622 So. 2d 974 (Fla. 1993) 26

In re Disciplinary Proceedings Against Huddleston, 974 P.2d 325 (Wash. 1999) 26

In re Discipline of Trujillo, 24 P.3d 972 (Utah 2001) 26

In re Dugger, 54 P.3d 595 (Or. 2002) 26

Edes' Case, 395 A.2d 498 (N.H. 1978) 26

Garrison v. Louisiana, 379 U.S. 64 (1964) 25, 26

Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) 25

Gillock v. Board of Prof'l Responsibility of Sup. Ct. of Tenn., 656 S.W.2d 365 (Tenn. 1983) 26

In re Hallmark, 831 A.2d 366 (D.C. 2003) 26

Haynes v. Ala. State Bar, 447 So. 2d 675 (Ala. 1984) 26

Idaho State Bar v. Frazier, 28 P.3d 363 (Idaho 2001) 26

Iowa State Bar Ass'n v. Kraschel, 148 N.W.2d 621 (Iowa 1967) 26

In re Karpin, 647 A.2d 700 (Vt. 1993) 27

Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) 25

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982) 12

Commonwealth v. Larsen, 682 A.2d 783 (Pa. Super. Ct. 1996) 3

Lawyer Disciplinary Bd. v. McCormick, 483 S.E.2d 866 (W. Va. 1997) 26

Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) 24

Marks v. United States, 430 U.S. 188 (1977) 17, 18

TABLE OF AUTHORITIES – Continued

Page

Matter of Belue, 766 P.2d 206 (Mont. 1988).....26

Matter of Capoccia, 466 N.Y.S. 2d 268 (N.Y. 1983).....26

Matter of Christoff, 690 N.E.2d 1135 (Ind. 1997).....26

Matter of Duncan, 541 S.W.2d 564 (Mo. 1976).....26

Matter of Green, 368 A.2d 245 (Pa. 1977).....15

Matter of Leopold, 366 A.2d 227 (Pa. 1976).....15

Matter of McCann, 669 A.2d 49 (Del. 1995).....26

Matter of Schiff, 684 A.2d 1126 (R.I. 1996).....26

Matter of Woll, 257 N.W.2d 650 (Mich. 1977).....26

Matter of Zar, 434 N.W.2d 598 (S.D. 1989).....27

Miss. Bar v. Shelton, 855 So. 2d 444 (Miss. 2003).....26

Montgomery County Bar Ass'n v. Hecht, 317 A.2d 597 (Pa. 1974).....15

In re Myers, 584 N.E.2d 357 (S.C. 2003).....26

N.C. State Bar v. Talford, 556 S.E.2d 344 (N.C. Ct. App. 2001).....27

New York Times v. Sullivan, 376 U.S. 254 (1964).....25

Office of Disciplinary Counsel v. Anonymous Attorney A, 714 A.2d 402 (Pa. 1998).....*passim*

Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989).....14

Office of Disciplinary Counsel v. Casety, 512 A.2d 607 (Pa. 1986).....14

Office of Disciplinary Counsel v. Chung, 695 A.2d 405 (Pa. 1997).....14

TABLE OF AUTHORITIES – Continued

Page

Office of Disciplinary Counsel v. Costigan, 584 A.2d 296 (Pa. 1990) 14

Office of Disciplinary Counsel v. Davis, 614 A.2d 1116 (Pa. 1992) 14

Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186 (Pa. 1994) 14

Office of Disciplinary Counsel v. Ewing, 436 A.2d 139 (Pa. 1981) 15

Office of Disciplinary Counsel v. Geisler, 614 A.2d 1134 (Pa. 1992) 16

Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730 (Pa. 1981) 15

Office of Disciplinary Counsel v. Herman, 426 A.2d 101 (Pa. 1981) 15

Office of Disciplinary Counsel v. Holston, 619 A.2d 1054 (Pa. 1993) 14

Office of Disciplinary Counsel v. Jackson, 637 A.2d 615 (Pa. 1994) 14

Office of Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986) 14

Office of Disciplinary Counsel v. Knepp, 441 A.2d 1197 (Pa. 1982) 15

Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (Pa. 1983) 15

Office of Disciplinary Counsel v. Monsour, 701 A.2d 556 (Pa. 1997) 14

Office of Disciplinary Counsel v. Passyn, 644 A.2d 699 (Pa. 1994) 14

TABLE OF AUTHORITIES – Continued

Page

Office of Disciplinary Counsel v. Price, 732 A.2d 599 (Pa. 1999) 8, 20, 21, 25

Office of Disciplinary Counsel v. Shorall, 592 A.2d 1285 (Pa. 1991) 14, 15

Office of Disciplinary Counsel v. Stern, 526 A.2d 1180 (Pa. 1987) 14

Office of Disciplinary Counsel v. Surrick, 555 A.2d 883 (Pa. 1989) 3

Office of Disciplinary Counsel v. Surrick, 749 A.2d 441 (Pa. 2000) 8

Office of Disciplinary Counsel v. Surrick, No. 101 DB 94, Report & Recommendation of Special Hr'g Comm. (Jan. 17, 1997) 5, 6, 21, 23

Office of Disciplinary Counsel v. Surrick, No. 101 DB 94, Op. (Pa. Sup. Ct. Oct. 17, 1998) 6, 23

Office of Disciplinary Counsel v. Surrick, No. 101 DB 94, Order (Pa. Sup. Ct. April 14, 1998) 7

Office of Disciplinary Counsel v. Surrick, No. 101 DB 94, Order (Pa. Sup. Ct. June 12, 1998) 7

Office of Disciplinary Counsel v. Surrick, No. 101 DB 94, Remand Report & Recommendations of the Disciplinary Bd. of Sup. Ct. of Pa. (April 1, 1999) 7, 8

Office of Disciplinary Counsel v. Wittmaack, 522 A.2d 522 (Pa. 1987) 14

In re Otterness, 232 N.W. 318 (Minn. 1930) 26

Painter v. Abels, 998 P.2d 931 (Wyo. 2001) 27

In re Pennica, 177 A.2d 721 (N.J. 1962) 26

TABLE OF AUTHORITIES – Continued

Page

People v. Sheffer, 35 P.3d 466 (Colo. O.P.D.J. 1999).....26

In re Procedures of Ark. Sup. Ct. Regulating Prof'l Conduct of Attorneys at Law, 963 S.W.2d 562 (Ark. 1998).....27

In re Ratner, 399 P.2d 865 (Kan. 1965).....26

Reno v. ACLU, 521 U.S. 844 (1997).....24

Rosenthal v. Justices of the Sup. Ct. of Cal., 910 F.2d 561 (9th Cir. 1990).....26

In re Ruffalo, 390 U.S. 544 (1968).....*passim*

In re Sealed Appellant, 211 F.3d 252 (5th Cir. 2000).....26

In re Shigon, 329 A.2d 235 (Pa. 1974).....15

State ex rel. Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46 (Neb. 1982).....26

State ex rel. Okla. Bar Ass'n v. Giger, 72 P.3d 27 (Okla. 2003).....26

Statewide Grievance Comm. v. Timbers, 796 A.2d 565 (Conn. 2002).....26

In re Stephenson, 367 N.E.2d 1273 (Ill. 1977).....26

Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 763 F. Supp. 128 (E.D. Pa. 1991), *aff'd in part, vacated in part*, 944 F.2d 137 (3d Cir. 1991)..... 3

In re Surrick, 338 F.3d 224 (3d Cir. 2003)..... 1, 11, 15, 17

In re Surrick, No. 00-086, Order (E.D. Pa. April 1, 1999)..... 9

In re Surrick, No. 00-MC-086, Amended Report & Recommendation at 3-4 (E.D. Pa. June 12, 2001)..... 9

Theard v. United States, 354 U.S. 278 (1957).....13

TABLE OF AUTHORITIES – Continued

Page

Tucker v. Va. State Bar, 357 S.E.2d 525 (Va. 1987).....26

Ex Parte Wall, 107 U.S. 265 (1883) 21

In re Woodall, 541 S.E.2d 649 (Ga. 2001).....26

In re Young, 849 So. 2d 25 (La. 2003).....26

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V..... 2

28 U.S.C. § 1254(1) 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert B. Surrick, Esq. ("Mr. Surrick" or "Petitioner"), respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. The court of appeals adopted the findings of the Pennsylvania Supreme Court and imposed reciprocal sanctions on Mr. Surrick based on state court proceedings that suspended Mr. Surrick, a critic of the state judiciary. Because the reciprocal sanctions were predicated on state proceedings that applied a new rule of conduct and a new burden of proof without an evidentiary hearing under those newly announced rules, the federal sanctions, like the state, violate Petitioner's due process rights.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit, reported at 338 F.3d 224, is reprinted at *Pet. App.* 1-40. The order denying rehearing en banc is reprinted at *Pet. App.* 101-02. The order and the unreported opinion of the United States District Court for the Eastern District of Pennsylvania is reprinted at *Pet. App.* 41-57.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 1, 2003. The court of appeals denied rehearing en banc on September

22, 2003. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the United States Constitution, the pertinent part of which is: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . " U.S. Const. amend. V.

STATEMENT

Background. Mr. Surrick is a lawyer who practiced law in Pennsylvania until his suspension by the Pennsylvania Supreme Court in 2000. For 38 years prior to that, he had practiced law in Pennsylvania in a distinguished manner. In 1980, he was appointed by then-Governor Richard Thornburgh to the state's Judicial Inquiry and Review Board ("JIRB"), an organization tasked with hearing complaints about and investigating alleged judicial misconduct. As an outgrowth of his work on that panel, Mr. Surrick became a vocal critic of judicial misconduct in Pennsylvania state courts. In 1987, Common Cause, a non-profit organization which advocates for honest and ethical government, recognized Mr. Surrick's work and awarded him the Public Service Achievement Award for his efforts to illuminate and correct deficiencies in the operation of the Pennsylvania state judiciary.

In the early 1980's, after a JIRB investigation of then-Justice Larsen of the Pennsylvania Supreme Court, Justice Larsen developed an apparent enmity toward Mr.

Surrick.[1] That enmity gave rise to several formal attempts by Justice Larsen to silence or punish Mr. Surrick for his public statements about Justice Larsen and, more generally, corruption in the state judiciary.

In 1983, at Justice Larsen's initiation, the Pennsylvania Supreme Court's Disciplinary Board lodged disciplinary charges against Mr. Surrick. Concurrently, Justice Larsen filed a libel suit against Mr. Surrick for his criticisms and allegations of judicial misconduct. That suit was dismissed, and subsequently Justice Larsen was convicted of a felony and removed from the bench.[2] In 1989, a second set of disciplinary charges was leveled against Mr. Surrick. After years of investigation and litigation that greatly detracted from his practice, both sets of charges were dropped, and Mr. Surrick was exonerated.[3]

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[1] In April 1983, Mr. Surrick, as a member of the JIRB, was the sole lawyer to vote to remove Justice Larsen from the bench.

[2] *See Commonwealth v. Larsen*, 682 A.2d 783, 786 (Pa. Super. Ct. 1996).

[3] The first complaint was filed by Justice Larsen and challenged the ethics of Mr. Surrick's public disclosure of the JIRB's disposition of the complaint against Larsen. *See Office of Disciplinary Counsel v. Surrick*, 555 A.2d 883, 884 (Pa. 1989) [hereinafter "*Surrick I*"]. That investigation lasted five years; the Disciplinary Board ordered a private reprimand, but Mr. Surrick was ultimately exonerated by a 3 to 2 vote of the Pennsylvania Supreme Court in 1989. *See id.* at 886.

Following dismissal of those charges, Disciplinary Counsel launched another investigation of Mr. Surrick in 1989. That investigation was dropped only after the United States District Court for the Eastern District of Pennsylvania, in a related proceeding, found that the Disciplinary Board had conceded it did not have a reasonable basis for disciplinary action against Mr. Surrick. *See Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 763 F. Supp. 128, 133 (E.D. Pa. 1991), *aff'd in part, vacated in part*, 944 F.2d 137 (3d Cir. 1991).

It is against this background that the charges underlying this case were brought in 1994. They arise out of a motion filed by Mr. Surrick in August 1992 to recuse certain superior court judges from hearing an appeal of a case in which Mr. Surrick and his wife were defendants.[4] In that motion, Mr. Surrick averred that two superior court judges were prejudiced against him because of his previous activities and that the trial judge had been improperly influenced in adjudicating the case against him. The Pennsylvania Supreme Court's Disciplinary Board, through its Office of Disciplinary Counsel, was again asked to investigate Mr. Surrick and his criticisms of the court – although the comments at issue were made in a duly filed motion to recuse. The investigation did not result in any charges against the judges accused of misconduct or bias, but did result in the third set of charges against Mr. Surrick brought by the state's Disciplinary Office in 11 years.

In Pennsylvania, the state supreme court has exclusive jurisdiction over both adoption of rules governing professional conduct and application of those rules to discipline attorneys. In its legislative capacity, the Pennsylvania Supreme Court promulgates the disciplinary codes themselves. In its executive and judicial capacity, the court provides and oversees the enforcement procedures, even when the charges involve criticism of that very court. The Pennsylvania Supreme Court appoints the members of the Disciplinary Board and, through the

[4] The case, *Leedom v. Spano*, Case No. 89-12977 in the Court of Common Pleas of Delaware County, Pennsylvania, involved foreclosure of a mortgage for which the Surricks were sureties.

Board, the Office of Disciplinary Counsel and any hearing committee that may be designated to take evidence upon charges made by Disciplinary Counsel. If Disciplinary Counsel files a petition charging an attorney, the matter is heard by a Special Hearing Committee, which makes a recommendation to the Disciplinary Board. Decisions of the Disciplinary Board may be appealed to the Pennsylvania Supreme Court. That court, then, acts as final arbiter of disciplinary cases in Pennsylvania, including cases involving allegations of its own misconduct.

Procedural History.

1. *State proceedings.* In November 1994, the Pennsylvania Office of Disciplinary Counsel filed a Petition for Discipline against Mr. Surrick, listing six separate counts. Five arose out of the 1992 motion to recuse filed by Mr. Surrick, and one arose from an unrelated dispute.[5] In 1995, a Special Hearing Committee conducted an evidentiary hearing into the charges. After hearing testimony from the three judges accused by Mr. Surrick, from Mr. Surrick himself, and from two other lawyers with knowledge of the subject judicial conduct, the Committee recommended

[5] The counts were a violation of Pennsylvania Rules of Professional Conduct (RPC) 3.1 (prohibition of frivolous pleadings); 3.3(a)(i) (prohibition of knowing false statements to tribunals); 8.2(b) (prohibition of knowing false accusations against judges); 8.4(c) (catch-all prohibition of conduct involving dishonesty, fraud, deceit or misrepresentation); 8.4(d) (prohibition of conduct prejudicial to the administration of justice); and of Pennsylvania Rule of Disciplinary Enforcement 402(a) (prohibition against disclosure of confidential misconduct proceedings). *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Report & Recommendation of Special Hr'g Comm., at 2-3 (Jan. 17, 1997).

that all charges against Mr. Surrick be dismissed. The Committee applied the then-recognized standards to the charges made against Mr. Surrick: that the Office of Disciplinary Counsel bore the burden of proof and that the violation required knowing falsity. Conducting the hearing under those rules, the Special Hearing Committee found that the challenged statements were not proved to be knowingly false. The Special Hearing Committee further found that Mr. Surrick's allegations had a reasonable basis in fact. Indeed, the Hearing Committee found that some of the judicial conduct about which Mr. Surrick complained was "so out of the range of ordinary error that it could reasonably give rise to suspicion that some improper influence had prevailed." *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Report & Recommendation of Special Hr'g Comm., at 13 (Jan. 17, 1997).

The matter then went to the full Disciplinary Board, which agreed that no disciplinary measures should be imposed. Reiterating the rules of conduct and burden of proof standards it had consistently applied in the past, the Board held that Disciplinary Counsel had failed to meet its burden of establishing that Mr. Surrick engaged in "deliberate and intentional deception" and that he had not been shown to have knowingly misstated things in his motion to recuse. *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Op., at 18 (Pa. Sup. Ct. Oct. 17, 1998). The Disciplinary Counsel appealed that decision to the Pennsylvania Supreme Court.

At that point, things changed. While the appeal was pending, the Pennsylvania Supreme Court, in a different case, held for the first time that reckless, as well as knowing, misrepresentations would violate the catch-all provision of RPC 8.4(c). *See Office of Disciplinary Counsel*

v. Anonymous Attorney A, 714 A.2d 402, 407 (Pa. 1998). Fourteen days later, that court ordered the Disciplinary Board to reevaluate its decision exonerating Mr. Surrick under the new, lower standard of "reckless" misstatement. *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Order (Pa. Sup. Ct. April 14, 1998).

Neither the Pennsylvania Supreme Court nor the Disciplinary Board remanded the charges to the Special Hearing Committee for a new hearing. Instead, in response to the state supreme court's directive, the Disciplinary Board applied what it expressly called "the new standard" to the hearing record developed over three years earlier. *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Order (Pa. Sup. Ct. June 12, 1998). This time the Disciplinary Board found that Surrick had recklessly criticized one of the superior court judges he had moved to recuse, thereby violating RPC 8.4(c), but no other rule. His allegations about the other two judges were found not reckless and not violative of RPC 8.4(c) or any other RPC.[6] The Board chose not to suspend or disbar Mr. Surrick, but determined that the appropriate discipline was public censure, reasoning that Mr. Surrick "chose to make his

[6] Thus, he was found *not* to have violated the two rules touching directly upon the disputed conduct, RPC 8.2(b) and 3.3(a)(1), which respectively prohibit making "knowingly . . . false accusations against a judge or other adjudicatory officers" and "knowingly . . . false statement[s] of material fact or law to a tribunal." Moreover, he was found innocent of the sole count unrelated to his motion to recuse, because it was discovered that the complaining lawyer had himself earlier disclosed the information he was claiming was still confidential. *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Remand Report & Recommendations of the Disciplinary Bd. of Sup. Ct. of Pa., at 24 (April 1, 1999).

statements in the forum of the public," and that his "sanction also be carried out in that same forum." *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Remand Report & Recommendations of the Disciplinary Bd. of Sup. Ct. of Pa., at 35 (April 1, 1999).

Disciplinary Counsel and Mr. Surrick both appealed the decision to the Pennsylvania Supreme Court. While *that* appeal was pending, the Pennsylvania Supreme Court, again in a separate case, changed a second rule applicable to RPC 8.4(c) proceedings. The court held, for the first time, that Disciplinary Counsel shouldered only "the initial burden of establishing that an attorney, based upon his own knowledge, made false allegations in a court pleading." *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 604 (Pa. 1999). The court ruled that this burden was fully satisfied by presenting "testimony from the victims of the allegations stating that the allegations are false." *Id.* The court stated that, once the criticized official denies the attorney's allegations, the burden then shifts to the attorney accused of making misstatements "to establish that the allegations are true or that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry." *Id.*

Following *Price*, the Pennsylvania Supreme Court asked the parties to the *Surrick* appeal to brief whether *Price* and its new burden paradigm should be applied retroactively to Mr. Surrick. After briefing and oral argument, the Pennsylvania Supreme Court held that it was proper to apply both the new rule of conduct (recklessness) and the new burden of proof retroactively to Mr. Surrick's 1992 conduct. *See Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441, 445 (Pa. 2000) [hereinafter "*Surrick II*"].

The Pennsylvania Supreme Court did not remand for further proceedings. It never gave Mr. Surrick a chance to present his case at an entirely new hearing under the new burden of proof. Applying both the new rule of conduct (recklessness) and the new burden of proof (requiring the defendant in a quasi-criminal proceeding to prove the truth or reasonableness of his statements) to the old hearing record, it closed the case and issued a final judgment. It went even further than the Disciplinary Board had gone, finding that Mr. Surrick violated RPC 8.4(c) in two instances, not one, and it imposed a five-year suspension, not the public censure recommended by the Disciplinary Board.[7]

2. *Federal proceedings.* Following suspension by the Pennsylvania Supreme Court, the matter was referred to the United States District Court for the Eastern District of Pennsylvania for application of reciprocal sanctions. On May 10, 2000, that court ordered Mr. Surrick to show cause, as set forth in Local Rule 83.6.II(D), that "imposition of identical discipline by the court would be unwarranted and the reasons therefor." *In re Surrick*, No. 00-086, Order (E.D. Pa. April 1, 1999). Reciprocal sanctions would be applied unless Mr. Surrick could show "that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." E.D. Pa. R. 83.6.II(D)(1).

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[7] Disciplinary Counsel conceded that such severe punishment for a single act was unprecedented in Pennsylvania disciplinary proceedings and was imposed because Mr. Surrick's statements alleged judicial corruption. *In re Surrick*, No. 00-MC-086, Amended Report & Recommendation, at 3-4 (E.D. Pa. June 12, 2001).

The district court appointed a three-judge panel to consider the matter, and on February 7, 2001, the panel unanimously determined that the state disciplinary proceedings were so procedurally defective that they did not merit reciprocity. *Pet. App.* at 58-98. Judge Pollak, writing for the panel, explained that the 1998 decision in *Anonymous Attorney A* had created a new rule of law that could not be retroactively applied to Mr. Surrick's 1992 motion to recuse. *Id.* at 86-96. Their conclusion was premised on the Pennsylvania Supreme Court's own pronouncement in *Anonymous Attorney A* that there was an "absence of precedent in Pennsylvania on the issue," on that court's turning to other jurisdictions to resolve the issue, and on the Disciplinary Board's understanding that the court had announced a "new standard." *Id.* at 87. Judge Pollak also expressed concern that the new, more stringent burden of proof used retroactively by the Pennsylvania Supreme Court had been applied "to an evidentiary record developed on the understanding that it was up to the Office of Disciplinary Counsel to shoulder the burden of proof." *Id.* at 91.

Judge Pollak concluded that "it is clear to us that the process of charge and proof that obtained in the state proceedings, even if constitutionally sufficient for the purposes of the Commonwealth, have not built a record and led to a judgment on which this court, in the performance of its independent responsibility to determine whether discipline should be imposed on a member of our bar, can confidently rely." *Id.* at 93.

The en banc District Court, by "the narrowest majority," then voted not to adopt the panel's report.[8] Subsequently, it issued a five-page opinion that based its conclusion, at least in part, on an error that first appeared in the Disciplinary Board's second decision: that Mr. Surrick "admitted" during the evidentiary hearing that he had no objective, factual basis for the statements he had made. *Pet. App.* at 42. However, he had not made any such admission; even the tribunal conducting that hearing concluded that Mr. Surrick had a reasonable basis for his assertions.[9]

Nevertheless, the District Court decided to apply reciprocal sanctions on the basis of the proceedings in the Pennsylvania state courts, finding that the retroactive application of a new rule of conduct and new burden of proof did not violate due process. Mr. Surrick was, on that basis, suspended for 30 months from practicing before the United States District Court for the Eastern District of Pennsylvania. *Pet. App.* at 57.

By a 2 to 1 vote, the United States Court of Appeals for the Third Circuit affirmed the district court (*In re Surrick*, 338 F.3d 224 (3d Cir. 2003) [hereinafter "*Surrick III*"]), finding that the Pennsylvania proceedings were

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[8] The court record shows that the vote was 14 to 13. *See In re Surrick*, No. 00-086, Order (E.D. Pa. June 11, 2001, Pollak, J., Unpublished Dissent, Docket Item 21).

[9] During the hearing, Disciplinary Counsel had cross-examined Mr. Surrick by asking whether his statements were entirely conjecture. His answer was no, that he had factual bases for them. *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Notes of Test., at 494 (Special Hr'g Comm. Jan. 17, 1997).

sufficient to satisfy "minimal" due process. *Pet. App.* at 23. Judge Cowen vigorously dissented on the ground that "the retroactive applications of both newly crafted standards impinged the guarantees of Due Process" and therefore the use of the state proceedings as the basis for reciprocal federal discipline was unwarranted and an abuse of the district court's discretion. *Id.* at 24.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION IS INCONSISTENT WITH THE DUE PROCESS CLAUSE AND DECISIONS OF THIS COURT.

By applying reciprocal discipline to Mr. Surrick, the court of appeals put its imprimatur on procedurally infirm state court proceedings. This action constituted a separate and distinct violation of Mr. Surrick's due process rights. *Cf. Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 482 (1982). In light of this decision, attorneys in the Third Circuit can expect little, if any, review of state disciplinary proceedings.

A. Retroactive Application Of A New Rule of Conduct Denied Petitioner Fair Notice Of The Charges Brought Against Him.

The Pennsylvania Supreme Court unconstitutionally added a new charge against Mr. Surrick by finding him guilty of a retroactively-applied new standard of conduct. Retroactive application of the new rule of conduct placed petitioner in the same position that this Court found unconstitutional in *In re Ruffalo*, 390 U.S. 544, 551 (1968).

Ruffalo involved a charge against an attorney added on the third day of hearings. Holding this procedure unconstitutional, the Court expressly recognized that the Due Process Clause requires that attorneys facing disciplinary charges receive "fair notice" of the charges brought against them. *Id.* at 551; *accord Theard v. United States*, 354 U.S. 278, 282 (1957) (recognizing that "[d]isbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred"). Further, "[t]he charge must be known before the proceedings commence." *Ruffalo*, 390 U.S. at 551. Adding or changing charges after taking evidence is a "trap," allowing disciplinary authorities to tailor charges to the testimonial record already created. *Id.* Thus, "procedural due process" requires that the accused be given fair notice of "the precise nature of the charges" before he begins his defense. *Id.* at 552.

Retroactively applying a new interpretation of a statute which unexpectedly broadens the meaning of impermissible conduct to include conduct that was previously permissible raises the same due process concerns as, and is thus equivalent to, adding an entirely new charge. Where a court retroactively applies a new statutory construction which makes additional conduct impermissible, the defendant will have no notice of the "precise nature of the charges brought against him." *Id.* at 552. This denies the accused due process "in its primary sense of an opportunity to be heard and to defend [his] substantive rights." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (internal citation omitted).

When Mr. Surrick conducted his defense at the 1995 evidentiary hearing, only intentional conduct had ever been held to violate RPC 8.4(c). Indeed, prior to the 1998

decision in *Anonymous Attorney A*, every one of the twenty six cases interpreting RPC 8.4(c) – or its predecessor DR-1-102(A)(4) – in which liability attached did so with respect to intentional, not reckless, conduct.[10] In *Office of*

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[10] Each of the RPC 8.4(c) cases required intentional conduct. *See Office of Disciplinary Counsel v. Monsour*, 701 A.2d 556 (Pa. 1997) (misappropriation of client funds); *Office of Disciplinary Counsel v. Chung*, 695 A.2d 405 (Pa. 1997) (making false statements to a federally insured financial institution); *Office of Disciplinary Counsel v. Duffield*, 644 A.2d 1186 (Pa. 1994) (failing to inform client of case status and then making dishonest representations to the Office of Disciplinary Counsel); *Office of Disciplinary Counsel v. Holston*, 619 A.2d 1054 (Pa. 1993) (forging a court document and then lying about it to a judicial authority); *Brown v. Hammond Assocs.*, 810 F. Supp. 644 (E.D. Pa. 1993) (making misrepresentations to clients and permitting the unauthorized practice of law by a non-lawyer); *Clemente v. Espinosa*, 749 F. Supp. 672 (E.D. Pa. 1990) (making out-of-court statements that accused an attorney of having Mafia ties).

The same is true as to DR-1-102(A)(4), the predecessor to RPC 8.4(c). *See Office of Disciplinary Counsel v. Passyn*, 644 A.2d 699 (Pa. 1994) (mishandling client funds and then lying about it to the court); *Office of Disciplinary Counsel v. Jackson*, 637 A.2d 615 (Pa. 1994) (unauthorized practice of law, sharing legal fees with a non-lawyer); *Office of Disciplinary Counsel v. Davis*, 614 A.2d 1116 (Pa. 1992) (initiating and perpetuating fraud on the court by counseling client to submit false address); *Office of Disciplinary Counsel v. Shorall*, 592 A.2d 1285 (Pa. 1991) (committing misprision of felony and willfully concealing client's fraud from investigating authorities); *Office of Disciplinary Counsel v. Costigan*, 584 A.2d 296 (Pa. 1990) (theft); *Office of Disciplinary Counsel v. Braun*, 553 A.2d 894 (Pa. 1989) (forging client's signature to withdraw funds); *Office of Disciplinary Counsel v. Stern*, 526 A.2d 1180 (Pa. 1987) (DR 1-1-2(A)(4) applies where there is "dishonesty" in the normal meaning of the word, i.e., where there is deviation from the truth); *Office of Disciplinary Counsel v. Wittmaack*, 522 A.2d 522 (Pa. 1987) (forging a document and testifying falsely under oath at trial constituted violations of multiple rules); *Office of Disciplinary Counsel v. Casety*, 512 A.2d 607 (Pa. 1986) (withholding information from Disciplinary Board about a prior conviction and devising a scheme to misrepresent ability to continue in active practice); *Office of*

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Disciplinary Counsel v. Shorall, 592 A.2d 1285, 1289 (Pa. 1991), the Pennsylvania Supreme Court recited *without correction or qualification* the Disciplinary Board's statement that intent was required for a violation of the predecessor to RPC 8.4(c).[11] Further, the Special Hearing Committee and the Disciplinary Board in Mr. Surrick's own proceedings – Pennsylvania's designated experts on attorney discipline, *see Surrick III*, *Pet. App.* at 29 (Cowen, J., dissenting) – proceeded on the basis that only knowing speech could constitute an RPC 8.4(c) misrepresentation.

However, in 1998, three years after Mr. Surrick's hearing, the Pennsylvania Supreme Court changed the

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Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986) (forging a check, commingling client funds); *Office of Disciplinary Counsel v. Lucarini*, 472 A.2d 186 (Pa. 1983) (commingling funds and converting them for personal use); *Office of Disciplinary Counsel v. Knepp*, 441 A.2d 1197 (Pa. 1982) (neglecting cases, converging client funds, making dishonest statements to clients); *Office of Disciplinary Counsel v. Ewing*, 436 A.2d 139 (Pa. 1981) (commingling funds, converting them for personal use, making misrepresentations to client); *Office of Disciplinary Counsel v. Herman*, 426 A.2d 101 (Pa. 1981) (neglecting case and making deliberate misrepresentation to client); *Office of Disciplinary Counsel v. Grigsby*, 425 A.2d 730 (Pa. 1981) (filing a sworn pleading known to be false); *Matter of Green*, 368 A.2d 245 (Pa. 1977) (converting funds, failure to turn over funds to client); *Matter of Leopold*, 366 A.2d 227 (1976) (failure to return funds to client); *In re Berlant*, 328 A.2d 471 (Pa. 1974) (attempting to solicit perjury and telling subpoenaed party he need not appear), *cert. denied*, 421 U.S. 964 (1975); *In re Shigon*, 329 A.2d 235 Pa. (1974) (submitting fraudulent and inflated medical claims and filing retainer agreements containing false information); *Montgomery County Bar Ass'n v. Hecht*, 317 A.2d 597 (Pa. 1974) (answering deposition questions untruthfully).

[11] The Disciplinary Board declined to impose sanctions in *Shorall* because respondent's conduct "did not amount to knowing misrepresentations as required by [DR1-102(a)(4)]. . . ." *Shorall*, 592 A.2d at 1289.

standard of conduct for RPC 8.4(c). *Anonymous Attorney A*, 714 A.2d at 405-407. The court's new interpretation of RPC 8.4(c) was "unexpected and indefensible by reference to the law which had been expressed prior to" Mr. Surrick's evidentiary hearing. *Bouie*, 378 U.S. at 354. The court itself acknowledged that the mental state necessary to violate RPC 8.4(c) was one of first impression for it and that its only previous case interpreting attorney "misrepresentation" (under the predecessor to RPC 8.4(c)), *Office of Disciplinary Counsel v. Geisler*, 614 A.2d 1134 (Pa. 1992), was "of limited value" in establishing the relevant mental state because it "focused on the discipline to be imposed on the respondent therein rather than his mental culpability." *Anonymous Attorney A*, 714 A.2d at 405.

Contending there was no guidance in Pennsylvania law, although prior cases had always applied an "intentional" conduct standard to RPC 8.4(c), the Pennsylvania Supreme Court turned to the law of four other states to decide what standard of conduct should constitute a "misrepresentation" in violation of RPC 8.4(c). *See id.* ("Given the absence of precedent in Pennsylvania on the issue *sub judice*, this court has looked to case law from other jurisdictions for guidance."). Using the position adopted in just four of the other 49 states, the court concluded that reckless, as well as knowing, misrepresentations would violate RPC 8.4(c). This Court has already held that the prior opinions from *those* states, however, cannot constitute fair notice to Mr. Surrick. "It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from" what it had long been understood to mean. *Bouie*, 378 U.S.

at 359-60; *accord Marks v. United States*, 430 U.S. 188, 195 (1977).[12]

Thus, Mr. Surrick did not, at the time of his 1995 evidentiary hearing, have fair notice that reckless conduct violated RPC 8.4(c). Nonetheless, the Pennsylvania Supreme Court retroactively applied that new rule of conduct to Mr. Surrick, effectively adding a charge of reckless misstatement five years after the close of evidence. This violated Mr. Surrick's due process right to fair notice of the charges brought against him.

The court of appeals' imposition of reciprocal discipline based on this violation of Mr. Surrick's due process rights also violated due process.[13]

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[12] *See also Surrick III, Pet App.* at 33 (Cowen, J. dissenting) ("That [six states interpret their disciplinary rules to extend to reckless misstatements] seems to prove only that forty-four states, or more than three-quarters of the nation, had not extended their rules to include reckless conduct.").

[13] Further, in sanctioning Pennsylvania's deprivation of Mr. Surrick's due process rights, the court of appeals repeated the Pennsylvania Supreme Court's constitutional mistakes. First, the panel majority, like the Pennsylvania Supreme Court, impermissibly cited the case law of states other than Pennsylvania to prove that misrepresentation includes reckless statements. Out-of-state cases do not provide fair notice of the state of the law in Pennsylvania. *See Bouie*, 378 U.S. at 359-60. Second, the panel majority cited to two Pennsylvania cases articulating the civil common law of misrepresentation. The civil common law, however, does not provide fair notice of the proper interpretation of criminal statutes. *See id.* at 357-58. Thus, under the court of appeals' application of *Ruffalo* and related due process doctrine, lawyers in the Third Circuit must survey the ethical rules of all fifty states to know what Pennsylvania may require, and they must survey analogous tort decisions to know if their proposed course of conduct

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B. Retroactive Application Of A New Rule Of Conduct Denied Petitioner Fair Notice That His Conduct Was Impermissible

The Due Process Clause prohibits a state judiciary from criminalizing past conduct. *See, e.g.*, *Marks*, 430 U.S. at 191-92; *Bouie*, 378 U.S. at 353-54.[14] At the time of Mr. Surrick's conduct, *i.e.*, his motion to recuse, he did not have fair notice that anything other than knowing misstatements about judges would constitute a violation of the RPC. Nevertheless, the Pennsylvania Supreme Court suspended him for conduct which at the time it occurred was not known to be an ethical violation. Therefore, the court of appeals violated Mr. Surrick's right to due process by suspending him reciprocally in reliance upon such flawed state court proceedings.

The Due Process Clause insures that "persons have the right to fair warning of that conduct which will give rise to" an ethical violation. *Marks*, 430 U.S. at 191. "[A]n unforeseeable judicial enlargement [of a statute or rule] . . . , applied retroactively, acts precisely like an ex post facto law" stripping the citizenry of fair warning of prohibited conduct. *Bouie*, 378 U.S. at 353-54. "If a state legislature is barred . . . from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from

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comports with Pennsylvania's written ethical rules. This cannot constitute fair notice.

[14] Mr. Surrick's suspension from the practice of law – a quasi-criminal sanction, *see, e.g.*, *Ruffalo*, 390 U.S. at 551 – deserves the same due process protection against criminalization of past conduct that is afforded in criminal actions.

achieving precisely the same result by judicial construction." *Id.*

As noted above, *see supra* Section I.A.1., n.10, by 1992, when Mr. Surrick filed his motion to recuse, close to two dozen reported decisions, including a decision of the Pennsylvania Supreme Court, had found RPC 8.4(c) violations only when based on intentional conduct. Further, the Pennsylvania Supreme Court itself acknowledged that there were no Pennsylvania decisions which applied a recklessness standard to 8.4(c) violations. *See Anonymous Attorney A*, 714 A.2d at 405-406. Moreover, the Pennsylvania Supreme Court explicitly cited, without correction or clarification, the Disciplinary Board's understanding that RPC 8.4(c) could only be violated by intentional conduct. Thus, the recklessness standard announced in *Anonymous Attorney A* was "unexpected and indefensible by reference to the law which had been" expressed in Pennsylvania "prior to the conduct at issue." *Bouie*, 378 U.S. at 354.

Pennsylvania's "unexpected and indefensible" judicial interpretation of RPC 8.4(c) in *Anonymous Attorney A* expanded the scope of impermissible conduct to include reckless misstatements. As such, Pennsylvania's retroactive application of the recklessness standard to Mr. Surrick's past actions violated Mr. Surrick's due process rights. The court of appeals' imposition of reciprocal discipline based on this due process violation itself violated due process.

C. Retroactive Application of A New Burden Of Proof Denied Petitioner Fair Notice Of His Evidentiary Burden.

The retroactive application of a new burden of proof constituted an unconstitutional "trap" which violated Mr. Surrick's due process rights.

In *Office of Disciplinary Counsel v. Price*, 732 A.2d 599 (Pa. 1999), the Pennsylvania Supreme Court announced its second tectonic shift in the law while Mr. Surrick's case was on appeal. Prior to *Price*, the Office of Disciplinary Counsel bore the burden of proving each element of any charge brought against a Pennsylvania attorney. *See In re Anonymous No. 39 D.B. 90*, 14 Pa. D. & C. 4th 65, 69-70 (1991) ("The Office of Disciplinary Counsel bears the burden of proving professional misconduct by a preponderance of clear and satisfactory evidence.") (citations omitted). Thus, before the 1999 *Price* decision, Disciplinary Counsel had to prove not only that statements were false, but also that the statements were made with the requisite state of mind.

In *Price*, the Pennsylvania Supreme Court announced a very different rule. The court decided that all Disciplinary Counsel need do to carry its burden is present "documentary evidence or testimony from the victims of the allegations stating that the allegations are false." *Id.* at 604. With that "burden" discharged, it is then up to the *accused lawyer* "to establish that the allegations are true or that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry." *Id.* Disciplinary Counsel's *entire* "burden" is, therefore, met if the judge offended by the accusations states that the accusations are not true. Thus, *Price* did not just shift the burden of production; it shifted the

burden of proof. The defendant lawyer who criticizes a judge must "establish" the truth of his statements or a reasonable factual basis therefore, effectively requiring attorneys to prove their innocence in quasi-criminal disciplinary proceedings. Even assuming this new burden of proof is constitutional in its own right – which is not at all clear[15] – its application to Mr. Surrick's case after the close of his hearing violated his due process rights.

Everyone involved in the Surrick evidentiary hearing operated under the assumption that the burdens were different from those later announced in *Price*. The parties were instructed that, and proceeded as if, it was Disciplinary Counsel's burden to prove the knowing or intentional falsity of Mr. Surrick's statements. *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Report & Recommendation of Special Hr'g Comm., at 10 (Jan. 17, 1997) (holding that a violation of RPC 8.4(c) could not be found based on the testimony of the judges alone because the RPC requires that Disciplinary Counsel provide "proof that the lawyer made knowingly false statements"). Mr. Surrick would undoubtedly have conducted his defense differently if he had known that it was his burden to prove the truth of his statements.

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[15] "'An attorney's license to practice [is] a 'right' which cannot lightly or capriciously be taken from him' . . . . The power to withdraw that right ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct. . . . [*Ex parte Wall*, 107 U.S. 265, 288 (1883).] . . . Not surprisingly then, it has become well settled that the charging party has the burden of proving that the charged attorney is no longer worthy of his office." *Charlton v. FTC*, 543 F.2d 903, 906 (D.C. Cir. 1976).

The Pennsylvania Supreme Court's retroactive application of this new burden is precisely what *Ruffalo* says states cannot do. States cannot, after the fact, change the rules governing the conduct of quasi-criminal hearings; doing so is a "trap" in violation of the accused's due process rights.

Pennsylvania's retroactive use of a new burden of proof that was not contemplated or applied at the time of the evidentiary hearing violated Mr. Surrick's due process right to fair notice. Thus, the court of appeals' imposition of reciprocal discipline based on this constitutional infirmity also violated due process.

D. Application Of A New Standard Of Conduct And A New Burden Of Proof To The Earlier-Compiled Evidentiary Record Denied Petitioner The Opportunity To Be Heard.

The Due Process Clause also requires that attorneys facing disciplinary charges receive an opportunity to be heard on those charges. *See Ruffalo*, 390 U.S. at 551. Even assuming the new charge announced in *Anonymous Attorney A* could constitutionally be applied to Mr. Surrick, due process required that Mr. Surrick have another evidentiary hearing in light of the new charge and new burden of proof.

The only evidentiary hearing afforded Mr. Surrick was conducted under the then-prevailing law that an RPC 8.4(c) violation required knowing misrepresentation and

that Disciplinary Counsel shouldered the burden of proof on each element of the charge.[16] The Pennsylvania Supreme Court's application of a new rule of conduct and a new burden of proof to a record compiled under the old, abandoned rules and burdens denied Mr. Surrick any meaningful opportunity to be heard. The rules were changed during appellate review and applied without remand.

The Pennsylvania Supreme Court placed Mr. Surrick in the very "trap" *Ruffalo* proscribes. In essence, charges were added and burdens shifted not just in the middle of his hearing, but years after his hearing had been closed. Then they were applied, after the fact, to that hearing record. Like Mr. Ruffalo, Mr. Surrick was given "no opportunity to expunge the earlier statements and start afresh." 390 U.S. at 551. As in *Ruffalo*, "how the charge would have

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[16] The Special Hearing Committee stated that "the offending statements must be *knowingly* false." *Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Report & Recommendation of Special Hr'g Comm., at 10 (Jan. 17, 1997) (emphasis added). The Special Hearing Committee also recognized that "the Rules of Professional Conduct . . . require *proof* that the lawyer made statements that were knowingly false." *Id.* (emphasis added). Likewise, the Disciplinary Board stated that "[w]hile Rule 8.4(c) does not specify the level of intent required for a violation to occur, the common meaning of the descriptive words within the Rule, 'dishonesty, fraud, deceit and misrepresentation,' necessitates that the prohibited conduct be *intentional*, and not merely negligent or careless." *See Office of Disciplinary Counsel v. Surrick*, No. 101 DB 94, Op., at 18 (Disciplinary Bd. of Sup. Ct. of Pa. Oct. 17, 1998) (emphasis added). Further, in adopting the Special Hearing Committee's recommendation, the Disciplinary Board held that Disciplinary Counsel failed to meet its burden of establishing that Mr. Surrick engaged in "deliberate and intentional deception." *Id.*

been met had it been originally included . . . no one knows." *Id.*

Suspending Mr. Surrick from the practice of law for making allegedly reckless misstatements, without a hearing on that charge, violates Mr. Surrick's right to procedural due process. So does suspending him without a hearing under the new burden of proof requiring him to "establish" the truth or reasonableness of his statements.

Because the Pennsylvania Supreme Court denied Mr. Surrick a hearing under the new recklessness standard and the new, more stringent burden of proof it used to suspend him from the practice of law, the court of appeals' imposition of reciprocal discipline was unconstitutional.

II. THIS CASE PRESENTS QUESTIONS IMPORTANT TO THE PUBLIC INTEREST.

The due process questions at issue here are of particular concern because of the context in which they occur. The process found constitutional below was a process in which a branch of the government punished a man for criticizing some of that same branch's members. When any branch of the government acts to protect itself from criticism, it is particularly important to ensure the legitimacy of the process by which it does so. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) ("We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.").

This Court has long recognized that due process concerns are particularly acute when speech rights are involved. *See Reno v. ACLU*, 521 U.S. 844, 871-73 (1997) (noting that concerns about both vagueness and severity of

punishment are heightened when speech regulations are involved); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-51 (1991) (holding that the role of attorneys in speaking out against state actions exacerbated vagueness concerns about a Nevada rule of attorney conduct); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 54-56 (1961) (noting that special concerns would attend attorney admission procedures in which the attorney bore the ultimate burden of persuasion because of fears that doing so would cause potential attorneys to "'steer far wider of the unlawful zone than if the state must bear these burdens'") (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The need for a reliable and fair process here is further underscored by the Pennsylvania Supreme Court's multiple role. It serves as legislature, executive, and judiciary. Thus, the usual checks and balances are absent. The circumstances of Mr. Surrick's prosecution highlight the risks of one court's broad control over all aspects of the process and raise issues of public concern.

Indeed, the Pennsylvania Supreme Court's decisions in *Anonymous Attorney A* and *Price* raise concerns that the court has effectively insulated the judiciary from attorney criticism under any circumstances. A bare assertion by an aggrieved public official that the attorney's criticism is false places the attorney in the position of having to defend his statement and bearing the full burden of proving its truth. This undermines the protections afforded by the First Amendment. As this Court has recognized, the Constitution "forbids the punishment of false statements [against public officials], unless made with knowledge of their falsity or in reckless disregard of whether they are true or false." *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964); *see also New York Times v. Sullivan*, 376 U.S. 254

(1964). The burden must be on the prosecution to prove both "that the utterance was false and that it was made with knowledge or in disregard" for the truth. *Garrison*, 379 U.S. at 74 (internal citations omitted).[17]

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[17] The Pennsylvania Supreme Court's insulation of its judiciary from criticism is also contrary to the decisions of every jurisdiction in the Union that has had the opportunity to decide this issue. Those courts require that the government bear the full burden of proof. *See, e.g., In re Young*, 849 So. 2d 25, 30 (La. 2003); *State ex rel. Okla. Bar Ass'n v. Giger*, 72 P.3d 27, 32 (Okla. 2003); *Miss. Bar v. Shelton*, 855 So. 2d 444, 445 (Miss. 2003); *In re Myers*, 584 N.E.2d 357, 360 (S.C. 2003); *In re Dugger*, 54 P.3d 595, 601 (Or. 2002); *Statewide Grievance Comm. v. Timbers*, 796 A.2d 565, 567 (Conn. 2002); *Idaho State Bar v. Frazier*, 28 P.3d 363, 366 (Idaho 2001); *Disciplinary Counsel v. Barnett*, 745 N.E.2d 1034, 1035 (Ohio 2001); *People v. Sheffer*, 35 P.3d 466, 471 (Colo. O.P.D.J. 1999); *In re Disciplinary Proceedings Against Huddleston*, 974 P.2d 325, 331 (Wash. 1999); *Matter of Christoff*, 690 N.E.2d 1135, 1139 (Ind. 1997); *Lawyer Disciplinary Bd. v. McCormick*, 483 S.E.2d 866, 869 (W. Va. 1997); *Matter of McCann*, 669 A.2d 49, 54 (Del. 1995); *Haynes v. Ala. State Bar*, 447 So. 2d 675, 677 (Ala. 1984); *Edes' Case*, 395 A.2d 498, 499 (N.H. 1978); *Disciplinary Matter Involving Triem*, 929 P.2d 634, 648 (Alaska 1996); *Matter of Belue*, 766 P.2d 206, 209 (Mont. 1988); *In re Discipline of Trujillo*, 24 P.3d 972, 978 (Utah 2001); *Matter of Schiff*, 684 A.2d 1126, 1127 (R.I. 1996); *Tucker v. Va. State Bar*, 357 S.E.2d 525, 527 (Va. 1987); *Gillock v. Bd. of Prof'l Responsibility of Sup. Ct. of Tenn.*, 656 S.W.2d 365, 367 (Tenn. 1983); *Matter of Woll*, 257 N.W.2d 650, 654 (Mich. 1977); *In re Hallmark*, 831 A.2d 366, 375 (D.C. 2003); *In re Application for Disciplinary Action Against Hoffman*, 670 N.W.2d 500, 502 (N.D. 2003); *In re Sealed Appellant*, 211 F.3d 252, 254 (5th Cir. 2000); *Rosenthal v. Justices of the Sup. Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir. 1990); *In re Stephenson*, 367 N.E.2d 1273, 1278 (Ill. 1977); *Fla. Bar v. Rood*, 622 So. 2d 974, 977 (Fla. 1993); *State ex rel. Neb. State Bar Ass'n v. Michaelis*, 316 N.W.2d 46, 48 (Neb. 1982); *In re Otterness*, 232 N.W. 318, 319 (Minn. 1930); *In re Ratner*, 399 P.2d 865, 876 (Kan. 1965); *Bar Ass'n of Balt. City v. Posner*, 339 A.2d 657, 660 (Md. 1975); *In re Pennica*, 177 A.2d 721, 730 (N.J. 1962); *Copren v. State Bar*, 183 P.2d 833, 840 (Nev. 1947); *In re Brown*, 416 P.2d 975, 997 (Ariz. 1966); *Iowa State Bar Ass'n v. Kraschel*, 148 N.W.2d 621, 625 (Iowa 1967); *Matter of Capoccia*, 466 N.Y.S. 2d 268, 269 (N.Y. 1983); *Disciplinary Bd. of Hawaii Sup. Ct. v. Kim*, 583 P.2d 333, 335 (Haw. 1978); *Matter of Duncan*, 541 S.W.2d 564, 569 (Mo. 1976); *In re*

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Moreover, the Pennsylvania Supreme Court's retroactive application of new standards undermines confidence in the rule of law. Changing the rules after the hearing has been completed calls into question what the rules are and whether they are reliably anchored against the shifting tides of personal bias and political pressure. Further, when attorneys are disciplined for criticizing the judiciary, there is a concern that the punishment may appear to be retributive. This appearance of impropriety damages the integrity and reputation of the judiciary.

To ensure their reputation, courts must provide the highest protections to those being disciplined for exercising their First Amendment rights to criticize the court system. As Justice Black wrote over sixty years ago:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v. California, 314 U.S. 252, 270 (1941).

Woodall, 541 S.E.2d 649, 653 (Ga. 2001); *Commonwealth ex rel. Buckingham v. Ward*, 103 S.W.2d 117, 120 (Ky. 1937); *In re Procedures of Ark. Sup. Ct. Regulating Prof'l Conduct of Attorneys at Law*, 963 S.W.2d 562, 568 (Ark. 1998); *N.C. State Bar v. Talford*, 556 S.E.2d 344, 349 (N.C. Ct. App. 2001); *Painter v. Abels*, 998 P.2d 931, 940 (Wyo. 2001); *Matter of Zar*, 434 N.W.2d 598, 602 (S.D. 1989); *In re Karpin*, 647 A.2d 700, 701 (Vt. 1993).

These protections were not afforded to Mr. Surrick. The Pennsylvania Supreme Court retroactively applied a new rule of conduct and a new burden of proof to Mr. Surrick. The Due Process Clause does not countenance such biased process, and a federal court's reciprocal imposition of a suspension, based solely on that infirm state court record, violates the Constitution and this Court's precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 22, 2003

United States Court of Appeals,
Third Circuit.

In re: Robert B. Surrick, Appellant.

No. 01-2783.

Argued Dec. 18, 2002.
Decided Aug. 1, 2003.

Howard J. Bashman[1] (Argued), Buchanan Ingersoll, Philadelphia, PA, for Amicus Curiae.

Samuel E. Klein, Jeffrey G. Weil (Argued), Brian Hirsch, Dechert, Price & Rhoads, Philadelphia, PA, for Appellant.

Before: *ROTH, FUENTES* and *COWEN*, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge.

This appeal arises out of reciprocal attorney disciplinary proceedings in the United States District Court for the Eastern District of Pennsylvania. The Pennsylvania Supreme Court had suspended appellant Robert Surrick from the practice of law for a period of five years after it concluded that he had violated a provision of the Rules of Professional Conduct by falsely accusing two lower court judges of "fixing" cases. Following an independent review

[1] The Court appreciates the fine service performed by Howard J. Bashman, Esq., at the Court's request, in presenting the brief for Amicus Curiae in support of affirmance.

of the state disciplinary proceedings, the *en banc* District Court held that reciprocal discipline was warranted but limited the term of Surrick's suspension to thirty months, or half that imposed by the state court. On appeal, Surrick argues that the imposition of reciprocal discipline was inappropriate because the state proceedings upon which the District Court relied violated his rights of due process and free speech. Because we conclude that the District Court did not abuse its discretion in electing to suspend Surrick for a period of thirty months, we will affirm the judgment of the District Court.

I. Factual Background and Procedural History

The facts relevant to Surrick's underlying state court suspension are drawn from the opinion of the Pennsylvania Supreme Court and the Report and Recommendation issued by the initial District Court panel. *See Office of Disciplinary Counsel v. Surrick,* 561 Pa. 167, 749 A.2d 441, 442-443 (2000) (*Surrick I*); *In re Surrick,* No. MISC. 00-086, 2001 WL 120078 (E.D.Pa. Feb.7, 2001) (*Surrick II*). Surrick and his wife were defendants in *Leedom v. Spano,* Case No. 89-12977 in the Court of Common Pleas of Delaware County, a case which involved the foreclosure of a mortgage for which they were sureties. By stipulation of the parties, the issue of liability was submitted to the court. Judge Harry J. Bradley entered judgment against Surrick and his wife in July 1992.

On appeal to the Superior Court, Surrick entered an appearance as co-counsel and, in August 1992, filed a motion for the recusal of certain judges prior to the designation of the appellate panel. This motion stated, in relevant part:

> It is believed and averred by Movant Surrick that Judge Bradley was "fixed" by the Delaware County Republican Organization as a result of a deal between that organization and Justice Larsen whereby Justice Larsen would again exert his political influence on behalf of Judge McEwen who was again seeking to fill a vacant Supreme court seat and, in return, the Delaware County Republican Organization, through its control of the Delaware county Judges, would fix this case.
>
> In litigation arising out of the termination of the Surrick/Levy law practice . . . Upon appeal to the superior court, judge Olszewski dismissed the appeal not on the basis of anything in the record *or any issue raised by opposing counsel* but on the basis of an alleged procedural defect in the record. Even the most cursory examination of the record will reflect that the alleged defect in the Record relied upon by Judge Olszewski does not and did not exist. It is the belief of Movant Surrick that the decision of Judge Olszewski was based upon outside intervention, as it could not have resulted from any rational legal analysis of the Record.

749 A.2d at 443 (ellipses and emphasis in original).[2]

The Office of Disciplinary Counsel investigated Surrick's allegations and, as a result, filed charges against him and convened a Special Hearing Committee of the Disciplinary Board. After due deliberation, the Special

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[2] Surrick has a well-documented history as an outspoken critic of the Pennsylvania judiciary dating back to his appointment to the Judicial Inquiry and Review Board in 1980. Because these facts are discussed in detail by the Pennsylvania Supreme Court, *see Surrick I*, 749 A.2d at 446-49, we find it unnecessary to repeat them here.

Hearing Committee issued a Report and Recommendation concluding that all charges should be dismissed. The Office of Disciplinary Counsel objected to the Report and Recommendation and sought oral argument before the Disciplinary Board. On October 17, 1997, the Board issued an opinion and order rejecting the arguments asserted by the Office of Disciplinary Counsel and dismissing the charges against Surrick.

The Office of Disciplinary Counsel filed a petition for allowance of appeal with the Pennsylvania Supreme Court. The court remanded the case to the Disciplinary Board on April 14, 1998, with instructions that the Board reconsider its prior recommendation in light of the then-recent decision in *Office of Disciplinary Counsel v. Anonymous Attorney A,* 552 Pa. 223, 714 A.2d 402 (1998).

On remand, the Disciplinary Board determined that Surrick had violated Rule 8.4(c)[3] of the Rules of Professional Conduct (RPC) in making his allegations against Judge Olszewski but found no violation in the allegations against Judge Bradley. The Pennsylvania Supreme Court then granted the parties' cross-petitions for review and directed both sides to file briefs addressing the applicability of its more recent decision in *Office of Disciplinary Counsel v. Price,* 557 Pa. 166, 732 A.2d 599 (1999). After consideration of the parties' arguments, a unanimous Pennsylvania Supreme Court held that Surrick had violated RPC 8.4(c) with respect to his charges against

[3] RPC 8.4(c) states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

both Judge Olszewski and Judge Bradley. *Surrick I,* 749 A.2d at 447-49. The court therefore suspended Surrick's license to practice law in the Commonwealth for a period of five years, effective March 24, 2000. *Id.* at 449.

Pursuant to Rule II(B)(2) of the Rules of Attorney Conduct (RAC) for the Eastern District of Pennsylvania,[4] the District Court, in response to the decision of the Pennsylvania Supreme Court, issued an order on May 10, 2000, requiring Surrick to show cause why reciprocal discipline should not be imposed upon him pursuant to RAC II(D). In his reply, Surrick asserted that reciprocal discipline was inappropriate because the decision of the Pennsylvania Supreme Court lacked proof and violated his rights of procedural due process and free speech. On February 7, 2001, a three judge panel of the District Court, following its review of the state disciplinary proceedings and the arguments of the parties, issued a Report and Recommendation concluding that no reciprocal discipline should be imposed on Surrick. *See Surrick II,* 2001 WL 120078. This recommendation was rejected by a majority of the non-recused active and senior judges of the Eastern District of Pennsylvania, and the matter was referred to a new three judge panel for consideration of the proper punishment. Following a hearing, this second panel issued an Amended Report and Recommendation on June

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[4] The Rules of Attorney Conduct (RAC) are codified in Rule 83.6 of the Eastern District of Pennsylvania's Local Rules of Civil Procedure. For ease of reference, Pennsylvania's Rules of Professional Conduct will be referred to throughout this Opinion as "RPC", and the Rules of Attorney Conduct contained in Local Rule 83.6 will be referred to as "RAC".

12, 2001, concluding that Surrick should be suspended for a period of thirty months retroactive to April 24, 2000.

On June 21, 2001, by a vote of seventeen to nine, the twenty-six non-recused active and senior district judges adopted the second panel's Amended Report and Recommendation. *See In re Surrick,* No. MISC. 00-086, 2001 WL 1823945 (E.D.Pa. June 21, 2001) (*Surrick III*). Surrick's thirty month suspension was made retroactive to April 24, 2000, the date of his state court suspension. The suspension expired on October 24, 2002.

Surrick appealed his District Court suspension.

II. Jurisdiction and Standard of Review

The District Court has the inherent authority to set requirements for admission to its bar and to discipline attorneys who appear before it. *See In re Mitchell,* 901 F.2d 1179, 1183 (3d Cir.1990); *In re Abrams,* 521 F.2d 1094, 1099 (3d Cir.1975). We have jurisdiction to review the final order of the District Court pursuant to 28 U.S.C. § 1291. We review district courts' decisions regarding the regulation of attorneys who appear before them for abuse of discretion. *Richardson v. Hamilton Int'l Corp.,* 469 F.2d 1382, 1386 (3d Cir.1972). Our review of the District Court's interpretation of legal precepts is plenary. *Epstein Family Partnership v. Kmart Corp.,* 13 F.3d 762, 765-66 (3d Cir.1994).

III. Discussion

A. Mootness

Because "'[t]he existence of a case or controversy is a prerequisite to all federal actions,'" *Philadelphia Fed'n of*

Teachers v. Ridge, 150 F.3d 319, 322-23 (3d Cir.1998) (quoting *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio,* 40 F.3d 1454, 1462 (3d Cir.1994)), we must begin by examining our jurisdiction to consider the matter before us. Although it is well-established that "bar admissions, bar disciplinary actions, and disbarments are essentially judicial in nature and thus present a case or controversy under Article III," *In re Calvo,* 88 F.3d 962, 965 (11th Cir.1996), we must determine whether Surrick's appeal was mooted when the term of his District Court suspension expired on October 24, 2002.

As we have previously held, "[a] case will be considered moot, and therefore nonjusticiable as involving no case or controversy, if the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *In re Kulp Foundry, Inc.,* 691 F.2d 1125, 1128 (3d Cir.1982) (citation and internal quotation omitted). Our analysis of whether a case is moot "traditionally begins with 'the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *International Bhd. of Boilermakers v. Kelly,* 815 F.2d 912, 914 (3d Cir.1987) (quoting *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)). The existence of a case or controversy, in turn, requires "'(1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution.'" *Id.* at 915 (quoting *Dow Chem. Co. v. United States Envtl. Protection Agency,* 605 F.2d 673, 678 (3d Cir.1979)).

Furthermore, "[i]n addition to its threshold constitutional dimension, mootness doctrine incorporates prudential considerations as well." *International Bhd. of Boilermakers,* 815 F.2d at 915. "Thus, in applying the mootness doctrine, courts, in addition to satisfying the requirements of Article III, 'must answer the more policy-oriented question whether the parties before it have, at the time for decision sufficient functional adversity to sharpen the issues for judicial resolution.'" *Id.* (quoting *Dow Chem.,* 605 F.2d at 677-78). Accordingly, "'the central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.'" *Id.* (quoting *Jersey Cent. Power & Light Co. v. State of N.J.,* 772 F.2d 35, 39 (3d Cir.1985)).

In addressing such questions, we have recognized three exceptions that should be considered prior to any determination of mootness:

> (1) whether the appellant has expeditiously taken all steps necessary to perfect the appeal and to preserve the status quo before the dispute becomes moot, (2) whether the trial court's order will have possible collateral consequences, and (3) whether the dispute is of such a nature that it is capable of repetition yet evading review.

Kulp Foundry, 691 F.2d at 1129.

We need not address the applicability of first and third exceptions noted above, as the continuing stigma resulting from his suspension places Surrick's appeal squarely within the second. *See Dailey v. Vought Aircraft Co.,* 141 F.3d 224, 228 (5th Cir.1998) (finding that the appeal of an attorney who was disbarred and then

reinstated was not moot because even temporary disbarment is harmful to a lawyer's reputation, and "the mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness") (citation and internal quotation omitted); *see also In re Hancock,* 192 F.3d 1083, 1084 (7th Cir.1999) (citing *Dailey* for the proposition that a suspended attorney's appeal was not mooted by his payment of the imposed sanction and subsequent reinstatement); *Kirkland v. National Mortgage Network, Inc.,* 884 F.2d 1367, 1370 (11th Cir.1989) (holding that attorney's appeal of the revocation of his *pro hac vice* status was not moot following dismissal of the underlying case because "the 'brand of disqualification' on grounds of dishonesty and bad faith could well hang over his name and career for years to come"); *Kleiner v. First Nat'l Bank of Atlanta,* 751 F.2d 1193, 1200 n. 14 (11th Cir.1985) (noting that "the brand of disqualification was not lifted at the close of the proceedings. The disciplinary action and consequent disqualification may expose counsel to further sanctions by the bar and portends adverse effects upon counsel's careers and public image. The effects of disqualification will linger long after the closing of the case. The controversy thus remains live and demands consideration."). Further, Surrick's suspension has a continuing effect on his ability to practice before the District Court, as RAC VII(A) provides that attorneys suspended for more than three months must apply for reinstatement.[5] Thus, we conclude that Surrick's claim satisfies the collateral

[5] Surrick is presently living in Florida and not practicing law, but, as his attorney stated at oral argument, he may some day decide to return to Pennsylvania and to resume his law practice.

consequences exception to the doctrine of mootness and that we have jurisdiction to consider the merits of his appeal.

B. Reciprocal Disciplinary Proceedings

The starting point for our review of federal district court disciplinary proceedings is the recognition that individual district courts, "like all federal courts, ha[ve] the power both to prescribe requirements for admission to practice before that court and to discipline attorneys" who appear before them. *Abrams,* 521 F.2d at 1099; *see also In re Kramer,* 193 F.3d 1131, 1132 (9th Cir.1999) (citing cases for the proposition that "[t]here is little question but that district courts have the authority to supervise and discipline the conduct of attorneys who appear before them."). "This includes the inherent authority to suspend or disbar lawyers," provided such power is "exercised within the parameters of due process." *Kramer,* 193 F.3d at 1132 (citations and internal quotations omitted).

A reciprocal disciplinary proceeding such as the one at issue here, in which a federal court initiates action against a member of its bar based on the outcome of a state disciplinary proceeding against that attorney, requires federal courts to conduct an independent review of the state disciplinary proceeding prior to imposing punishment. Indeed, it is well-settled that, although state bar membership is required of those seeking admission to practice before the federal district courts of a given state, "disbarment by the [s]tate does not result in automatic disbarment by the federal court." *In re Ruffalo,* 390 U.S. 544, 547, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). Rather, although the decisions of state courts in such matters are

"entitled to respect," they are "not conclusively binding on the federal courts." *Id.*

However, "[i]n striking the appropriate balance . . . district courts must not operate in a vacuum. If the disciplinary proceedings derive from state court action, federal courts are not totally free to ignore the original state proceedings." *Abrams,* 521 F.2d at 1099-1100 (citing *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957)). Instead, they must "examine the state proceeding for consistency with the requirements of due process, adequacy of proof and absence of any indication that imposing discipline would result in grave injustice." *In re Jacobs,* 44 F.3d 84, 88 (2d Cir.1994) (citing *Selling v. Radford,* 243 U.S. 46, 51, 37 S.Ct. 377, 61 L.Ed. 585 (1917)). More specifically, as the Supreme Court has held, federal courts should impose reciprocal discipline unless "an intrinsic consideration of the state record" indicates one of the following infirmities:

> 1. That the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2. that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on [the part of the federal court] that [it] could not, consistent[ ] with [its] duty, accept as final the conclusion on that subject; or 3. that some other grave reason exist[s] which should convince [the federal court] that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon [the court] not to disbar except upon the conviction that, under the principles of right and justice, [it is] constrained so to do.

Selling, 243 U.S. at 51, 37 S.Ct. 377; *see also Theard,* 354 U.S. at 282, 77 S.Ct. 1274. RAC II(D), which governed the

proceedings below, was enacted on the basis of this ruling. *See In re Pawlak,* No. 94-211, 1995 WL 723177, at *4 (E.D.Pa. Dec.1, 1995).[6]

Moreover, attorneys subject to reciprocal discipline in federal court bear the burden of demonstrating, "by clear and convincing evidence, that one of the *Selling* elements precludes reciprocal discipline." *In re Kramer,* 282 F.3d 721, 724-25 (9th Cir.2002) (citing cases). Thus, there is no entitlement to a *de novo* trial before the District Court. *See In re Alker,* 307 F.2d 880, 881 (3d Cir.1962); *see also Calvo,* 88 F.3d at 967. Rather, the District Court need only "determine whether the record underlying the predicate state disbarment reveals the kind of infirmities identified

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[6] RAC II(D) provides as follows:

D. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (B) above and after an opportunity for any attorney contesting the imposition of the identical discipline or prohibition to be heard by one or more judges designated by the Chief Judge, this court shall impose the identical discipline unless the respondent-attorney demonstrates, or this court finds, that upon the face of the record upon which the discipline or prohibition in another jurisdiction is predicated it clearly appears: 1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

2. that there was such an infirmity of proof as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or

3. that the imposition of the same discipline or prohibition by this court would result in grave injustice; or

4. that the misconduct or other basis established for the discipline or prohibition is deemed by this court to warrant substantially different action.

Where this court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

in *Selling." Calvo,* 88 F.3d at 967 (citation and internal quotations omitted).

Finally, as we noted in *Abrams,* "we perceive our role in reviewing the district court's action to be extremely limited." 521 F.2d at 1101. In particular, it consists of the following:

> (1) To recognize and reinforce an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admission and disciplinary procedures of (a) the state courts and (b) this court.
>
> * * *
>
> (3) To recognize that an absolute and unfettered power of the district court to discipline lawyers may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relies upon a state's legal or factual determinations. Stated otherwise, the district court's action may be circumscribed to the extent it depends in whole or in part on a state's actions, either for the commencement of the disciplinary proceedings or for a stated basis in the determination of the sanction imposed.

Id. It is against this backdrop that we consider the proceedings at issue here.

C. Surrick's Due Process and First Amendment Arguments

The issue before us on this appeal is whether the *en banc* District Court abused its discretion in relying on the state court proceedings as the basis for its decision to impose reciprocal discipline upon Surrick. In rejecting the conclusion of the initial panel and adopting the Amended

Report and Recommendation, the District Court noted that it was required to impose reciprocal discipline "unless it 'clearly' appeared to the court" that at least one of the four elements of RAC II(D) was satisfied. *Surrick III,* 2001 WL 1823945 at *1.

Following its review of the state disciplinary proceedings, the District Court determined that none of the RAC II(D) conditions were met in this case. In support of this conclusion, the District Court noted that (1) not even the first District Court panel, which opposed the imposition of reciprocal discipline, concluded that the state disciplinary proceedings violated Surrick's right to due process; (2) there was no infirmity of proof, particularly in view of the fact that Surrick admitted during the state disciplinary proceedings "that he had no objective factual basis for the accusations he made in his sworn affidavit to the state court about purportedly corrupt conduct by a state judge"; and (3) the Amended Report and Recommendation, issued by the second District Court panel, took into account the fact that the five year suspension meted out by the state court exceeded that of other comparable cases, and therefore recommended a suspension of only half that duration. *Surrick III,* 2001 WL 1823945, at *1.

In asserting that the District Court abused its discretion by so concluding, Surrick contends first that the District Court erred in failing to find a due process violation in the Pennsylvania Supreme Court's retroactive application of *Anonymous Attorney A* and of *Price* to his case. He next argues that the District Court's conclusion that a second evidentiary hearing would be futile was based on an improper reading of the initial panel's Report and Recommendation. Finally, Surrick asserts that the imposition of reciprocal discipline violates his First

Amendment rights and therefore constitutes a grave injustice. We address each argument in turn.

In considering Surrick's due process argument, we begin by reiterating our prior observation that, although attorney disciplinary proceedings "ha[ve] consequences which remove [them] from the ordinary run of civil case[s]," they are "not criminal in nature." *Abrams,* 521 F.2d at 1099. It therefore follows that the protections normally afforded criminal defendants are not required here. *See In re Palmisano,* 70 F.3d 483, 486 (7th Cir.1995) (noting that the Supreme Court's decision in *Ruffalo* "does not require courts to employ the procedures of the criminal law in disbarment matters"); *In re Cordova-Gonzalez,* 996 F.2d 1334, 1336 (1st Cir.1993) (holding that, "[a]lthough attorney discipline proceedings have been called 'quasi-criminal,' *In re Ruffalo,* 390 U.S. 544, 550, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968), the due process rights of an attorney in a disciplinary proceeding 'do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case.'") (quoting *Razatos v. Colorado Supreme Court,* 746 F.2d 1429, 1435 (10th Cir.1984)); *Rosenthal v. Justices of the Supreme Court of Cal.,* 910 F.2d 561, 564 (9th Cir.1990) (holding that "[a] lawyer disciplinary proceeding is not a criminal proceeding. As a result, normal protections afforded a criminal defendant do not apply.") (citations omitted).

With this background in mind, we consider Surrick's due process argument. In *Anonymous Attorney A,* the Pennsylvania Supreme Court held that, although it had not expressly decided the issue of the mental state necessary to establish culpability for misstatements made in violation of RPC 8.4(c), it would follow the lead of other states with identical versions of the rule that had rejected

a requirement of actual knowledge. 714 A.2d at 406-07. Thus, the Pennsylvania Supreme Court, in accordance with existing decisions in other jurisdictions, held that "a culpable mental state greater than negligence is necessary to establish a *prima facie* violation of [RPC] 8.4(c)," and that "[t]his requirement is met where the misrepresentation is knowingly made, or where it is made with reckless ignorance of the truth or falsity thereof." *Id.* at 407. Surrick now asserts that the District Court erred in failing to conclude that the Pennsylvania Supreme Court's retroactive application of this ruling to his case was a violation of due process that precluded the imposition of reciprocal discipline.

We disagree. It is well-settled "that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee,* 532 U.S. 451, 462, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) (quoting *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)).[7] Although Surrick contends that "no one could reasonably have anticipated"

[7] The Supreme Court's ruling in *Rogers,* by its terms, applies only to criminal proceedings. However, we see no basis for refusing to apply the same rationale here. As we noted, *supra,* the full panoply of rights provided in criminal proceedings are not required in attorney disciplinary proceedings. Thus, it necessarily follows that attorneys involved in disciplinary proceedings are not entitled to any greater protection from the retroactive application of judicial rulings than that afforded to criminal defendants.

the legal standards applied to his case by the Pennsylvania Supreme Court, even a cursory review of the state of the law at the time of the conduct in question reveals otherwise. Indeed, while it is true that the Pennsylvania Supreme Court had not formally addressed the issue prior to its decision in *Anonymous Attorney A,* it was nevertheless well-settled at the time of Surrick's conduct that liability under the standards of DR 1-102(A)(4), the predecessor to RPC 8.4(c), extended to reckless misstatements. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346 (Revised) (1982); *see also People v. Rader,* 822 P.2d 950, 953 (Colo.1992); *Committee on Legal Ethics of the W.V. State Bar v. Farber,* 185 W.Va. 522, 408 S.E.2d 274, 284-85 (1991); *Dowling v. Alabama State Bar,* 539 So.2d 149, 152 (Ala.1989); *In re Silverman,* 113 N.J. 193, 549 A.2d 1225, 1238 (1988); *In re Zang,* 154 Ariz. 134, 741 P.2d 267, 280 (1987); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Hurd,* 360 N.W.2d 96, 104 (Iowa 1985). Further, it was well-established in Pennsylvania at that time that the term "misrepresentation" – one of the types of misconduct prohibited by RPC 8.4(c) – included statements made with reckless disregard for the truth. *See, e.g., Berda v. CBS Inc.,* 881 F.2d 20, 27 (3d Cir.1989) (noting that reckless statements are sufficient to maintain a claim for misrepresentation under Pennsylvania law); *Highmont Music Corp. v. J.M. Hoffmann Co.,* 397 Pa. 345, 155 A.2d 363, 366 (1959) (holding that "[a] material misrepresentation may be found whether [Defendant] actually knew the truth or not, especially where, as here, it was bound to ascertain the truth before making the representation.").

We therefore reject Surrick's contention that prior to *Anonymous Attorney A,* nothing in the history of RPC

8.4(c) had stated or even foreshadowed that reckless conduct could violate it. Indeed, in view of the foregoing, the Pennsylvania Supreme Court's decision in *Anonymous Attorney A* was neither "unexpected" nor "indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers,* 532 U.S. at 462, 121 S.Ct. 1693. This is perhaps best illustrated by the fact that the Pennsylvania Supreme Court remanded Attorney A's case for application of the purportedly new standard despite the fact that, as here, the conduct at issue plainly occurred prior to its ruling in that case. *See Anonymous Attorney A,* 714 A.2d at 407. Thus, we hold that the District Court did not err in concluding that the application of the ruling in *Anonymous Attorney A* to Surrick's case was consistent with the requirements of due process.

Similarly, we conclude that the District Court did not err in rejecting Surrick's due process argument regarding the application to his case of the Pennsylvania Supreme Court's decision in *Price.* Surrick contends that the decision in *Price* established a new burden of proof that is unconstitutional both in design – because it purportedly violates the presumption of innocence to which he is entitled – and as retroactively applied to his case. However, the *Price* court was careful to note that the burden of proving misconduct by a preponderance of the evidence rests, as it always has, with the Office of Disciplinary Counsel. *See Price,* 732 A.2d at 603. The ruling in *Price* simply made clear the fact that, once a prima facie case of false allegations in a court pleading has been established, the burden shifts to the respondent to demonstrate "that the allegations are true or that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry." *Id.* at 604.

This holding in *Price* was in no way "unexpected" or "indefensible by reference to the law which had been expressed prior to the conduct in issue," *Rogers,* 532 U.S. at 462, 121 S.Ct. 1693, as it was already "well-established" prior to the decision in *Price* "that every court pleading containing an averment of fact not of record is required to state that the assertion is true based upon the pleader's personal knowledge, information or belief," and that such averments must "be supported by oath or affirmation or made subject" to certain penalties. *Price,* 732 A.2d at 603. Thus, at the time Surrick made the allegations contained in the recusal motion, Pennsylvania law already required attorneys to "bear[ ] the burden of establishing a factual basis" for allegations contained in pleadings submitted to the courts of the Commonwealth. *Id.*

Indeed, although the justices differed as to the appropriate punishment, the Pennsylvania Supreme Court was unanimous in its application of the purportedly new ruling to Price himself despite the fact that, as in this case, the record in *Price* had been developed prior to the Pennsylvania Supreme Court's express articulation of this burden of production. *See id.* at 604-05.[8]

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[8] To the extent that Surrick asserts that the decision in *Price,* which involved RPC 3.3(a)(1) and RPC 8.2(b), may not be applied to his violation of RPC 8.4(c), we reject this argument. Not even the first District Court panel found any basis for this claim. *See Surrick II,* 2001 WL 120078 at *14 (holding that "[w]e see no ground for questioning the [Pennsylvania Supreme Court's] judgment that the *Price* procedural regime was properly transferable to RPC 8.4(c) proceedings.").

Surrick's next argument – that the District Court abused its discretion in concluding that a second evidentiary hearing would be futile – is closely related. Specifically, he asserts that, in view of the purported changes in the requisite mental state and burden of proof that resulted from the Pennsylvania Supreme Court's decisions in *Anonymous Attorney A* and *Price,* he should have been provided a second evidentiary hearing at which he could have addressed the issues raised by these decisions. However, despite having advance notice that the ruling in *Price* might be applied to his case, Surrick never requested either an evidentiary hearing or the reopening of the record during the state proceedings. Thus, any due process violation that might have resulted from the failure to hold a second hearing was waived. *See United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (holding that "'[n]o procedural principle is more familiar . . . than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'") (quoting *Yakus v. United States,* 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944)).

Further, even if this claim had not been waived, Surrick has failed to identify any evidence not presented in the first hearing that would have led to a conclusion that he had an objectively reasonable basis for the allegations contained in his recusal motion. Indeed, despite his claim that he bore no burden of production prior to the ruling in *Price,* Surrick voluntarily offered extensive testimony during the three-day proceedings regarding his purported bases for the statements contained in the recusal motion. In light of this, it is difficult to imagine

that he could or would have come forward with any additional information if provided the opportunity to do so in a second hearing. In addition, both the Disciplinary Board and the District Court found, based on the testimony and evidence already in the record, that Surrick's statements were unsupported. *See Surrick III,* 2001 WL 1823945, at *1 ("Mr. Surrick admitted at state disciplinary proceedings that he had no objective factual basis for the accusations he made in his sworn affidavit to the state court about purportedly corrupt conduct by a state judge."); Report and Recommendations of the Disciplinary Bd. of the Supreme Court of Pennsylvania at 29-30 (noting Surrick's admission that the charges leveled against Judge Olszewski were based on conjecture and theory). In view of the foregoing, we simply cannot conclude that the District Court abused its discretion in electing to impose reciprocal discipline despite the absence of a second state court hearing, particularly when such a hearing was never requested by Surrick in the first instance.

Moreover, we note with respect to each of Surrick's first two arguments that no member of the District Court – including the original three member panel which recommended that no reciprocal discipline be imposed – concluded that the state disciplinary proceedings failed to satisfy minimal due process requirements. *See Surrick III,* 2001 WL 1823945, at *1 ("The court determined that there was no clear deprivation of due process of law. Significantly, while critical of the approach of the Pennsylvania Supreme Court, even Judge Pollak, the author of the panel report of February 7, 2001, acknowledged that the report had not concluded that Mr. Surrick was deprived of his federal constitutional right to due process.").

We further note that Surrick's reliance upon *Ruffalo* is misplaced. In *Ruffalo,* an *additional* charge of misconduct was brought against the attorney in question following the completion of his testimony in the state disciplinary proceedings. *See* 390 U.S. at 546-47, 88 S.Ct. 1222. That new charge served as the sole basis for the Sixth Circuit Court of Appeals' decision to impose reciprocal discipline. *Id.* The Supreme Court reversed the judgment of the court of appeals, concluding that the addition of a new charge at that stage of the state court proceedings violated Ruffalo's right of due process, thereby making the imposition of reciprocal discipline inappropriate. *Id.* at 550-551, 88 S.Ct. 1222.

Contrary to Surrick's contention, we conclude that the Pennsylvania Supreme Court's application of its rulings in *Anonymous Attorney A* and *Price* did not amount to a new charge, and therefore is not functionally equivalent to the actions held violative of due process in *Ruffalo. Cf. Committee on Prof'l Ethics and Grievances of the Virgin Islands Bar Ass'n v. Johnson,* 447 F.2d 169, 172-74 (3d Cir.1971) (applying *Ruffalo* to situation in which disciplinary charges were amended based on the testimony of the attorney in question); *see also In re Slattery,* 767 A.2d 203, 210-11 (D.C.2001) (noting that "we understood *Ruffalo* as holding that due process was violated because the bar association failed to give Ruffalo prior notice that his conduct would amount to, in the words of the Supreme Court, a 'disbarment offense,' with the consequence that Ruffalo was trapped into admitting that he had committed a disciplinary violation. . . . *Ruffalo* rests on the premise that the amendment of charges created an impermissible trap since, at the time of the proceedings, the attorney could not have known that the defense he asserted would

subject him to disbarment") (citations and internal quotations omitted).

Thus, we hold that the District Court did not err in concluding that the state disciplinary proceedings complied with minimal due process requirements. As a consequence, it did not abuse its discretion in imposing reciprocal discipline as required by its local rules in the absence of a due process violation. *See* RAC II(D).

We need not address the merits of Surrick's third and final argument – that the state court's ruling violates his First Amendment rights and therefore constitutes a grave injustice pursuant to RAC II(D) – as he failed to adequately raise it before the District Court. *See Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir.1991). Further, to the extent that Surrick's reply brief may be read to challenge the District Court's finding of waiver with respect to the First Amendment argument that was asserted below, we conclude that his failure to identify or argue this issue in his opening brief constitutes waiver of this argument on appeal. *See Kost v. Kozakiewicz,* 1 F.3d 176, 182 (3d Cir.1993). Moreover, even if Surrick's objection to the District Court's finding of waiver had been properly presented in his opening brief, we have reviewed the record and find no abuse of discretion.

Finally, we note that the question whether the imposition of either state or reciprocal federal discipline was appropriate under the circumstances of this case is clearly one over which reasonable jurists may disagree. However, even conceding that we would view some of Surrick's arguments as presenting close issues if called upon to examine them in the first instance, we have no difficulty

in concluding that the District Court *en banc* did not abuse its discretion in imposing reciprocal discipline.

IV. Conclusion

For the reasons stated above we will affirm the judgment of the District Court.

COWEN, *Circuit Judge, dissenting.*

I agree with the majority's framing of the question presented on this appeal: whether the District Court abused its discretion by relying on the decision of the Pennsylvania Supreme Court to impose reciprocal discipline. I further agree that we have jurisdiction to consider this appeal, and concur with the majority's review of Surrick's belated First Amendment challenge. However, I part company with the majority's analysis of the Due Process concerns raised by the District Court's countenance of the mental standard and burden of proof ultimately applied to Surrick's Commonwealth disciplinary charge. The Pennsylvania Supreme Court's expansion of the Pennsylvania Rules of Professional Conduct to prohibit reckless misstatements was unexpected under the clearly expressed law of the Commonwealth. Likewise, the Pennsylvania Supreme Court's changes to the proof sufficient to establish attorney misrepresentations materially altered the evidentiary burdens used at Surrick's hearing. The retroactive application of both newly crafted standards impinged the guarantees of Due Process applicable to Surrick's hearing, and presented a grave reason to reject the Commonwealth's decision. Given these flaws, the use of the Commonwealth's discipline as the basis for reciprocal federal discipline was unwarranted, and an abuse of the District Court's discretion. Accordingly, I

respectfully dissent from the majority's reasoning and its decision.

I.

Like the majority, I begin by noting this Court's extremely limited role in reviewing the disciplinary decisions of the District Court. *In re Abrams,* 521 F.2d 1094, 1101 (3d Cir.1975). The District Court, like all federal courts, enjoys a broad power to regulate and discipline admitted attorneys. *In re Snyder,* 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985). However, the District Court's "absolute and unfettered" disciplinary authority "may be circumscribed to the extent the district court, in imposing its disciplinary sanctions, relied upon a state's legal or factual determinations." *In re Abrams,* 521 F.2d at 1101. This limitation recognizes that "[w]hile a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route." *Theard v. United States,* 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957). Thus, while a state disciplinary decision "is entitled to respect, it is not conclusively binding on the federal courts." *In re Ruffalo,* 390 U.S. 544, 547, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Theard,* 354 U.S. at 282, 77 S.Ct. 1274; *In re Abrams,* 521 F.2d at 1099-1100.

The Supreme Court has outlined three areas of constitutional concern where a federal court should not give controlling weight to a state disciplinary decision: 1) where the state procedure, "from want of notice or opportunity to be heard, was wanting in due process"; 2) where there was such an infirmity of proof "as to give rise to a clear conviction" that the state's judgment cannot be

accepted as final; or 3) where some other grave reason exists to reject the decision of the state court. *Selling v. Radford,* 243 U.S. 46, 51, 37 S.Ct. 377, 61 L.Ed. 585 (1917); *see also* R. of Attorney Conduct II.D (codified at R. of Civ. P. for the E.D. Pa. 83.6). This Court must examine the Commonwealth disciplinary proceedings to determine whether Surrick has demonstrated, by clear and convincing evidence, that one of these factors warranted a departure from the presumptive imposition of federal discipline. *In re Kramer,* 282 F.3d 721, 724-25 (9th Cir.2002); *In re Jacobs,* 44 F.3d 84, 88 (2d Cir.1994); *In re Rosenthal,* 854 F.2d 1187, 1188 (9th Cir.1988).

II.

Like the majority, I also apply *Rogers v. Tennessee,* 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) in evaluating whether the Pennsylvania Supreme Court's retroactive decisions satisfied federal Due Process. Attorney disciplinary hearings "are adversary proceedings of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. at 551, 88 S.Ct. 1222; *In re Abrams,* 521 F.2d at 1099. Although attorneys are not entitled to the full panoply of protections afforded to criminal defendants, they are "entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo,* 390 U.S. at 550, 88 S.Ct. 1222; *Comm. on Prof'l Ethics and Grievances of V.I. Bar Ass'n v. Johnson,* 447 F.2d 169, 173 (3d Cir.1971). These procedural safeguards ensure that the nature of the state's allegation is known before the commencement of a disciplinary hearing so that the accused attorney might meet the charges of misconduct. *In re Ruffalo,* 390 U.S. at 551, 88 S.Ct. 1222.

These same concerns are reflected in the Supreme Court's decision in *Rogers v. Tennessee,* which limited the retroactive application of judicial alterations of common law criminal doctrines. *Rogers* holds that while courts have substantial interpretive leeway, the Due Process clause limits "unjustified and unpredictable breaks with prior law" to protect against "vindictive or arbitrary judicial lawmaking." *Id.* 532 U.S. at 462, 121 S.Ct. 1693. These concerns are heightened in the highly charged context of attorney disciplinary hearings, where "sensitive personal, institutional and societal interests" converge into a "jural environment that is fraught with tension and devoid of decisional and precedential guideposts." *In re Abrams,* 521 F.2d at 1100. Therefore, judicial alteration of a state rule of professional conduct may not be applied retroactively "where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.'" *Rogers,* 532 U.S. at 462, 121 S.Ct. 1693 (quoting *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)).

III.

Against this background, I consider the retroactive application of the recklessness standard to Surrick's misstatements. Pennsylvania Rule of Professional Conduct 8.4(c) states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The plain language of RPC 8.4(c) does not specify a relevant state of mind, and the

comments accompanying the rule are similarly silent.[1] At the time of Surrick's action in 1992, no decision of the Pennsylvania Supreme Court had interpreted the mental state required for sanctions under the rule. *Office of Disciplinary Counsel v. Anonymous Attorney A,* 552 Pa. 223, 714 A.2d 402, 405-06 (1998).

Citing the text of RPC 8.4(c) and the absence of any interpretive authorities, the Special Hearing Committee of the Disciplinary Board in this case concluded that only knowingly false statements violate the rule. App. at 160. The Special Committee explained that Pennsylvania "did not adopt the language of the Model Rules which contained a more objective 'knew or should have known' standard." App. at 160. Given this distinction, the use of an objective recklessness standard would "disregard[ ] the plain language of the Rule as promulgated in this Commonwealth." App. at 162. The Special Committee concluded that because there was "no evidence whatsoever presented that Mr. Surrick *knew* that the accusations made were false," no violation of RPC 8.4(c) was established.[2] App. at 162-63.

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[1] Disciplinary Rule 1-102(A)(4), the precursor to RPC 8.4(c), also lacked a mental standard. *Office of Disciplinary Counsel v. Anonymous Attorney A,* 552 Pa. 223, 714 A.2d 402, 404-05 & n. 7 (1998).

[2] Despite this ruling, the Special Committee went on to opine that the evidence failed to show Surrick was unreasonable in his allegations. App. at 163. Although the Special Committee's statement that "we cannot conclude that he . . . did not have a reasonable basis [ ] to make the assertions that he did" was unnecessary given its interpretation of RPC 8.4(c), its analysis of the evidence at the hearing is nonetheless notable.

The Disciplinary Board adopted these conclusions. The Board explained that "negligent or careless conduct was not sufficient to constitute a violation of Rule 8.4(c)." App. at 183. Significantly, the Board based this holding on its then recent decision in *Office of Disciplinary Counsel v. Rebert,* No. 28 D.B. 95 (April 23, 1997) which also found no misconduct for merely mistaken, rather than intentional, misrepresentations.[3] The Disciplinary Board's reliance on *Rebert* is significant because that decision, recaptioned as *Anonymous Attorney A,* was reversed by the Pennsylvania Supreme Court while Surrick's case was on appeal. As I shall discuss, the Disciplinary Board's reliance on *Rebert* to exonerate Surrick reveals that the Commonwealth's designated disciplinary authority did not anticipate the standard that would be announced in *Anonymous Attorney A.* I thus turn to the facts, reasoning, and holding of that decision.

The Pennsylvania Supreme Court began its opinion in *Anonymous Attorney A* by noting that no prior decision of either the Supreme Court or the Disciplinary Board had examined the requirement of intent under RPC 8.4(c). The Court explained that while an earlier case did address attorney misrepresentations under DR 1-102(A)(4) (the predecessor rule to RPC 8.4(c)), the case did not "address the mental culpability standard for an attorney's alleged misrepresentations which Petitioner must meet in order to establish a violation. . . . " *Anonymous Attorney A,* 714 A.2d at 405 (discussing *Office of Disciplinary Counsel v.*

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[3] The unpublished decision of the Disciplinary Board in *Rebert* is available at http:// www.courts.state.pa.us/OpPosting/disciplinaryboard/dboardopinions/28DB95.OP.pdf.

Geisler, 532 Pa. 56, 614 A.2d 1134 (1992)). The Court concluded that because "*Geisler* focused on the discipline to be imposed . . . rather than . . . mental culpability, that opinion is of limited value in resolving the question presently before us." *Id.*

The Court then turned to *In re Anonymous,* 126 D.B. 92, 26 Pa. D. & C. 4th 427, 1995 WL 864102 (1995), "[t]he sole Disciplinary Board decision addressing a mental culpability standard" under RPC 8.4(c) or DR 1-102(A)(4). *Id. In re Anonymous* involved a disciplinary charge arising out of an attorney's failure to abide by the terms of an informal admonition. In exchange for an informal sanction, the attorney twice agreed to return a client's file. Despite these representations to the Disciplinary Board, the attorney failed to return the materials, leading to an additional disciplinary charge for his false statement. The Disciplinary Board held that while RPC 8.4(c) "does not attach an independent state of mind requirement," the common meaning of "misrepresentation" includes "an assertion not in accordance with the facts." *In re Anonymous,* 26 Pa. D. & C. 4th at 436 (quoting *Black's Law Dictionary* 903 (5th ed.1979)). Based on this definition, the Disciplinary Board concluded that the attorney's negligent misrepresentation to the Board was "an assertion not in accordance with the facts," and a violation of RPC 8.4(c). *Id.* The Pennsylvania Supreme Court viewed "the egregiousness of the facts in *In re Anonymous*" as the basis for the discipline. *Anonymous Attorney A,* 714 A.2d at 405. Given the severity of the facts, the Court concluded "that this decision is of no precedential value regarding the issue sub judice." *Id.* at 405-06.

The Pennsylvania Supreme Court thus found no authorities explaining the mental state required under

RPC 8.4(c), and "given the absence of precedent in Pennsylvania on the issue," proceeded to canvass the case law from other jurisdictions. *Id.* at 406. After reviewing the decisions of four other states, the Supreme Court adopted the interpretation of Colorado's analogous disciplinary rule and held that "no actual knowledge or intent to deceive" is necessary to prove a violation of RPC 8.4(c). *Id.* at 407. Instead, misconduct is established by recklessness, "the deliberate closing of one's eyes to facts that one had a duty to see or state as fact things of which one was ignorant." *Id.* The Court concluded that this holding "clarifies" the finding in *Geisler. Id.*

Anonymous Attorney A reveals three facts regarding the state of Pennsylvania law prior to 1998: 1) the text of RPC 8.4(c) does not contain a state of mind requirement; 2) the prior decision of the Pennsylvania Supreme Court in *Geisler* – the only Supreme Court decision to even consider attorney misrepresentations under DR 1-102(A)(4) or RPC 8.4(c)-did not impose a state of mind requirement; and 3) the prior decision of the Disciplinary Board in *In re Anonymous* had "no precedential value" regarding the state of mind requirement. These facts reveal a complete lack of Pennsylvania authority on the meaning of RPC 8.4(c), and explain the Supreme Court's examination of cases outside the Commonwealth.

The Pennsylvania Supreme Court's opinion in *Office of Disciplinary Counsel v. Surrick,* 561 Pa. 167, 749 A.2d 441 (2000) essentially accepts these conclusions, and acknowledges that no case addressed the mental standard of RPC 8.4(c) before *Anonymous Attorney A. Id.* at 444. Nonetheless, the Pennsylvania Supreme Court viewed the glass as half-empty, reasoning that because "[n]o precedent had declared only intentional conduct would violate"

the rule, attorneys must have assumed that some lesser degree of conduct might be actionable. *Id.* at 445. To support this conclusion the Supreme Court pointed to the outcome in *Geisler,* the case that it previously characterized as offering "limited value" to this issue, and requiring the "guidance" offered by Colorado law. *Id.* at 444. Thus, with no more than a citation to *Geisler* and the unsupported statement that the recklessness standard was not unforeseeable, the Pennsylvania Supreme Court determined that *Anonymous Attorney A* governed Surrick's conduct some eight years before the decision. Given this thin reasoning, the original District Court panel to review Surrick's case understandably found it "hard to escape the conclusion" that *Anonymous Attorney A* decided an issue of first impression. App. at 82.

The majority labors to bolster the Supreme Court's scant analysis in an attempt to argue that given "the state of the law" in 1992, Surrick should reasonably have anticipated the decision in *Anonymous Attorney A.* First, the majority finds it "well-settled" that reckless conduct satisfied DR 1-102(A)(4), the predecessor to RPC 8.4(c). This assertion, however, lacks any citation to Pennsylvania law. Nor could any citation be included, given "the absence of precedent in Pennsylvania on the issue." *Anonymous Attorney A,* 714 A.2d at 406. Instead, the majority cites to an opinion of the American Bar Association interpreting Model DR 1-102(A)(4). But as stated by the Special Committee, Pennsylvania did not adopt the language of the ABA Model Rule in promulgating RPC 8.4(c), and looking to the ABA's interpretations of a objective standard would "disregard[ ] the plain language of the Rule as promulgated in this Commonwealth." App. at 162.

The majority then offers six state court opinions interpreting the disciplinary rules of their individual jurisdictions to extend to reckless misstatements. That fact seems to prove only that forty-four states, or more than three-quarters of the nation, had not extended their rules to include reckless conduct. Thus, while this survey might indeed prove some "general state of the law," it does not support the majority's conclusion that recklessness was a well-settled standard. More importantly, the majority does not accompany these citations with any principle of law that requires attorneys to conform their behavior not only to the rules of their jurisdiction, but to those promulgated in all others.

Next, the majority offers several decisions holding that misrepresentations are actionable as torts in Pennsylvania if made with a reckless disregard for the truth. *See, e.g., Berda v. CBS, Inc.,* 881 F.2d 20, 27 (3d Cir.1989) (discussing tort claims for fraud and negligent misrepresentation). But as the majority agrees, this Court has already held that a disciplinary proceeding "has consequences which remove it from the ordinary run of civil case." *In re Abrams,* 521 F.2d at 1099. Using a common law doctrine to expand the meaning of a criminal statute is generally prohibited in Pennsylvania. 1 Pa. Cons.Stat. Ann. § 1928(b)(1) (West 2003) (stating that penal provisions shall be strictly construed). Strict construction is also required for the interpretation of retroactive laws. *Id.* § 1928(b)(2). The civil laws cited by the majority to justify the Pennsylvania Supreme Court's retroactive application of a new disciplinary ruling have little, if any, application to such a quasi-criminal proceeding.

Finally, the majority views the Pennsylvania Supreme Court's decision to remand the case in *Anonymous Attorney A* as evidence that the recklessness standard was not new law. The correctness of the Supreme Court's decision to remand that case, in light of the Disciplinary Board's understanding that only intentional misrepresentations satisfied RPC 8.4(c) and the requirements of 1 Pa. Cons.Stat. Ann. § 1928(b)(2), is not before this Court. As succinctly stated by the District Court panel, the Pennsylvania Supreme Court's decision in *Anonymous Attorney A,* as in *Surrick,* "settles the issue as a matter of Pennsylvania law." App. at 82.

> But it does not settle for this court the federal due process question whether it was fundamentally unfair for the Commonwealth of Pennsylvania, through its highest court, in 2000, to suspend Mr. Surrick from the practice of law for five years because of actions taken at a time-nearly eight years before the court's decision-when there was an 'absence of precedent in Pennsylvania' that his actions were sanctionable.

App. at 82. Our focus on this appeal is whether the application of *Anonymous Attorney A* was unexpected or indefensible by reference to prior law. The Pennsylvania Supreme Court's interpretation of Commonwealth law does not, therefore, substitute for our own independent Due Process analysis.

The majority's reasoning does not support the conclusion that the recklessness standard of *Anonymous Attorney A* was foreseeable. More fundamentally, however, it is unhelpful to examine the general "state of the law" in other jurisdictions, or in other substantive areas, instead of the law of Pennsylvania regarding attorney misrepresentations. It is clear from *Anonymous Attorney A*

that no prior law explained the application of RPC 8.4(c). It is clear from the record that the Special Hearing Committee and the full Disciplinary Board both believed that RPC 8.4(c) did not embrace objectively reckless misstatements. And it is clear from the Disciplinary Board's citation to *Rebert,* the very case that would later announce the recklessness standard, that the Board did not anticipate the Pennsylvania Supreme Court's decision. Given the text of RPC 8.4(c), and the absence of any interpretive authority, it is not surprising that even the professional experience and institutional learning of Pennsylvania's highest disciplinary authority was insufficient to predict the Supreme Court's decision.

For these reasons, I am left with the same conclusion as the District Court panel: *Anonymous Attorney A* announced a new standard for attorney misconduct, one that was not obvious from the text of RPC 8.4(c), foreshadowed by prior decisions, or even suggested by the state of Pennsylvania disciplinary law. The better reading of that decision is the one offered by the Pennsylvania Supreme Court itself: a new professional standard drawn from a Colorado Supreme Court decision. The decision to alter RPC 8.4(c) is, without question, entrusted to the Pennsylvania Supreme Court. It is not ours to dispute that decision, or its retroactive application to Surrick's misstatements. It is, however, the role of this Court to determine whether some grave reason exists to reject the District Court's reliance on those judgments. The recklessness standard of *Anonymous Attorney A* was unexpected and indefensible under the law prior to Surrick's conduct. Relying on the retroactive application of that holding to impose reciprocal federal discipline was clearly erroneous.

IV.

Similar concerns support my conclusion that the retroactive application of the burden-shifting framework announced in *Office of Disciplinary Counsel v. Price,* 557 Pa. 166, 732 A.2d 599 (1999) constitutes a grave reason to depart from the Commonwealth's sanctions. I begin by outlining the elements of RPC 8.4(c) and the burden of proof applied by the Disciplinary Board at Surrick's hearing. As explained by the Special Hearing Committee, RPC 8.4(c) required the Office of Disciplinary Counsel to prove that Surrick knew his allegations were false. App. at 163 ("The focus of the inquiry, in this case, was to Mr. Surrick's state of mind in making these allegations and not to the ultimate truth or falsity of the allegations."). The Disciplinary Board further explained that the Office of Disciplinary Counsel must prove Surrick's actual subjective knowledge by clear and satisfactory evidence. App. at 178. *Anonymous Attorney A* changed the first of these requirements by adding an objective recklessness standard. Thus, under the new formulation, the Office of Disciplinary Counsel could prove Surrick actually knew his statements were false, or that he made the statements with reckless ignorance of the facts.

Office of Disciplinary Counsel v. Price then changed the second requirement. In *Price,* the Pennsylvania Supreme Court affirmed that "the burden of proving misconduct lies with the Office of Disciplinary Counsel," that misconduct must be shown "by a preponderance of the evidence," and that proof of the misconduct must be clear and satisfactory. *Price,* 732 A.2d at 603. The Supreme Court then noted that every fact asserted in a court pleading must be based on either the pleader's personal knowledge, or the results of a reasonably diligent inquiry.

Id. Synthesizing these requirements, *Price* held that the Office of Disciplinary Counsel may satisfy its burden to prove the alleged misconduct simply by demonstrating that the statements at issue were false. *Id.* at 604. After this initial showing, "[t]he burden then shifts to the respondent to establish that the allegations are true or that he had an objective reasonable belief that the allegations were true, based upon a reasonably diligent inquiry." *Id.*

The majority views this second alteration as unexceptional given that the burden of proof remains on the Office of Disciplinary Counsel, and that the relevant quantum of evidence remains clear and satisfactory. This explanation, however, does not consider that *what* the Office must prove is no longer the attorney's subjective knowledge, or the objective unreasonableness of the attorney's belief. Instead, the Office need only prove the objective falsity of the statement, after which the attorney carries the burden to either prove the statement true, or to prove a reasonably diligent inquiry supported the erroneous belief. By formulating the burdens in this manner, the Office of Disciplinary Counsel is no longer required to prove (by any measure of evidence) that the attorney actually knew the statements were false, as was the practice before *Anonymous Attorney A.* And the Office need not even prove that the attorney failed to conduct a reasonable inquiry, as seemed to be the requirement after *Anonymous Attorney A.* Under *Price,* therefore, the Office of Disciplinary Counsel is relieved of proving the state of mind requirement added to RPC 8.4(c), and permitted to rest its case solely on the falsity of the statements at issue.

It bears repeating that as with the new recklessness standard, the Pennsylvania Supreme Court's decision in

Price is relevant only to this Court's consideration of whether to afford Surrick's Commonwealth discipline presumptive force. That question turns, as before, on whether the change in *Price* was unexpected or indefensible. The majority contends that it was not, quoting the Pennsylvania Supreme Court's view that "the pleader in a court proceeding bears the burden of establishing a factual basis upon which his allegations are based." *Price,* 732 A.2d at 603. However, *Price* itself does not cite any authority for this claim, making its presumptive force suspect. Moreover, the relevant issue is not whether Surrick had a duty to verify the contents of his pleading. That duty is unquestionably established by Pa. R. Civ. P. 1023 [4] and 1024, and Pennsylvania courts are authorized to impose appropriate sanctions for bad faith violations. Surrick's misstatements might have been the basis for penalties before the Superior Court.

Price goes a step further, allowing an attorney's duty of verification under the civil rules to automatically satisfy the Office of Disciplinary Counsel's case under RPC 8.4(c), if the attorney's statements are false. Whether that is a desirable rule is of no moment. That it was an unexpected departure from prior practice is acknowledged by the Pennsylvania Supreme Court's explanation that *Price* "set forth an objective standard" based on a newly crafted shifting burden of production. *Surrick,* 749 A.2d at 445.[5]

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[4] Rule 1023 was rescinded effective July 1, 2002. New Rules 1023.1-1023.4 continue the requirements of the old rule, and provide additional instruction on remedies for violations.

[5] The majority also views the Pennsylvania Supreme Court's decision to apply this new framework to the conduct at issue in *Price* as

(Continued on following page)

The process required during disciplinary proceedings includes, at a minimum, fair notice of the misconduct alleged. *In re Ruffalo,* 390 U.S. at 550, 88 S.Ct. 1222; *Johnson,* 447 F.2d at 173. Knowledge of the violation charged, and hence the accompanying elements and burdens, is critical to mounting a proper defense. More importantly, adequate notice protects attorneys from the specter of vindictive and arbitrary discipline. *Rogers,* 532 U.S. at 462, 121 S.Ct. 1693. Like the District Court panel, I do not find it necessary to determine whether the retroactive application of *Price* to Surrick's conduct violated federal Due Process. Instead, I would hold that the Due Process concerns implicit in the retroactive application of a new burden of proof provide a grave reason to reject the District Court's reliance on the Pennsylvania Supreme Court's decision. *Price* was unexpected and indefensible under prior law, and the retroactive application of its framework "should not be accepted as adequate for the purposes of disbarment from a federal court." *In re Ruffalo,* 390 U.S. at 552, 88 S.Ct. 1222 (Harlan, J., concurring). So viewed, the District Court's decision was clearly erroneous.[6]

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evidence that the burden allocation was not new law. I find this reasoning irrelevant for the same reasons I disagree with majority's reliance on the Supreme Court's decision to remand *Anonymous Attorney A.*

[6] Because I would hold that the retroactive application of *Price* is a sufficiently grave reason to reject the Commonwealth's decision, I need not address Surrick's additional Due Process arguments, or the majority's analysis of those issues.

V.

I note finally that my disagreement with the majority's analysis implies no view on the substance of Surrick's allegations. With that observation, and for the foregoing reasons, I must dissent from the majority's decision.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ROBERT B. SURRICK

MISC. NO. 00-086

June 14, 2001, Filed

GILES, C.J.

While the reasons for the court's action in this matter on April 2, 2001 and June 11, 2001 were amply expressed orally by me and others, Judge Pollak correctly notes that an opinion or other written statement has not been filed.[1] In view of his dissent and that of Judge Dalzell, I will on behalf of the court file a brief written explanation at this time.

Under this court's Rules of Disciplinary Enforcement as set forth in L.R. Civ. P. 83.6, the court was required to impose upon Mr. Surrick identical discipline to that imposed by the Supreme Court of Pennsylvania unless it "clearly" appeared to the court that there had been a deprivation of due process; that there was a significant infirmity of proof establishing the misconduct; that imposition of such discipline would result in grave injustice; or, that the misconduct warrants substantially different discipline.

The court determined that there was no clear deprivation of due process of law. Significantly, while critical of the approach of the Pennsylvania Supreme Court, even

[1] Local Rule 83.6, II does not require a formal written statement of reasons for imposition of reciprocal discipline.

Judge Pollak, the author of the panel report of February 7, 2001, acknowledged that the report had not concluded that Mr. Surrick was deprived of his federal constitutional right to due process.[2] The court found there was no infirmity of proof. Indeed, Mr. Surrick admitted at state disciplinary proceedings that he had no objective factual basis for the accusations he made in his sworn affidavit to the state court about purportedly corrupt conduct by a state judge.[3] The state Supreme Court also found the same as to accusations against another state judge.

The court ultimately concluded that the discipline warranted by the misconduct in question was a suspension of 30 months. It did so in recognition of the fact that the 60 months imposed by the state did seem to exceed discipline in comparable cases. Nevertheless, it is simply inaccurate to characterize that discipline as "uniquely and unprecedentedly harsh" as does Judge Dalzell in his dissent. An attorney who filed pleadings with false accusations of case fixings by judges well before the Surrick matter arose was

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[2] Indeed at pages 32-33 of his opinion, Judge Pollak expressly states, "we find it unnecessary to determine whether ... the state disciplinary proceedings were, taken in the aggregate, so fundamentally flawed as to yield the conclusion that "the [state] procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process."

[3] In view of that admission, the court was particularly unpersuaded by the contention that Mr. Surrick was denied an opportunity to present evidence to the contrary under what some perceived to be a "new procedural regime" adopted by the State Supreme Court. *In re: Ruffalo,* 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968) and *Theard v. U.S.,* 354 M.S. 278 (1957) are not to the contrary. They hold only that a federal court is not bound by a state disciplinary determination and a federal court should satisfy itself that imposition of such discipline comports with federal due process. This our court has done.

disciplined with a suspension of 36 months. *See In re Anon,* 7 Pa. D. & C.4th 125 (1990).

Most of Judge Dalzell's dissent deals with the "profound First Amendment interests" that he perceives were "violated by the imposition of such discipline." It must be noted, however, at disciplinary proceedings before a panel of this court, Mr. Surrick's attorney expressly declined to pursue a First Amendment claim when pressed by Judge Dalzell on that subject. In fact, there is no First Amendment right to defame another or willfully to disregard the professional and ethical obligations reasonably imposed upon members of the bar.

To characterize, as Judge Dalzell does, the court's action in this case as "unsought" and "disquieting" is itself disquieting. The court was confronted with a case of discipline imposed on an attorney by the Supreme Court of Pennsylvania and did nothing more or less than apply its own Rules of Disciplinary Enforcement as it is required to do.

Judge Dalzell may be correct when he suggests that it takes courage for a lawyer to accuse a judge of misconduct but surely that does not justify a reckless and irresponsible allegation of misconduct.[4]

Perhaps most troubling is Judge Dalzell's discussion of the number of state judges engaged in improper ex parte communications and other misconduct. Unless he is

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[4] At the same time, Judge Dalzell's ability to identify 266 reported cases of such misconduct suggests that lawyers and others have not been deterred.

suggesting that there should be a presumption that a charge by a lawyer of such misconduct by a state judge is true, this discussion is gratuitous. If he means to suggest that such a presumption should be entertained, the court disagrees. The state judiciary is served by hundreds of honorable men and women who deserve and have our respect.

Judge Dalzell states that "the conduct of which Surrick complained . . . involves the heart of the judicial branch of government." So, however, does the type of conduct for which Mr. Surrick has been disciplined. Nothing is more corrosive to public confidence in the judicial branch than claims of case fixing.[5] For a lawyer recklessly to make such a claim is highly improper.

The court recognizes that many decisions are not unanimous and dissent is not uncommon. When even one judge publicly characterizes a disciplinary decision as "unwarranted," however, it is appropriate for the Chief Judge on behalf of the court to explain why such a decision is warranted. I have attempted to do so concisely in this memorandum.

6/14/01 JAMES T. GILES, C.J.

Pollak, J., *joined by* Judges Fullam, Newcomer, Green, O'Neill, Padova and Kauffman, JJ., *dissenting*.

On February 7, 2001, a panel of three judges of this court, of whom I was one, filed a Report and Recommendation in the above matter. (*See* Appendix A, annexed

[5] Such claims, of course, also demean attorneys and undermine public confidence in the integrity of the legal profession.

hereto). In the "Report" portion of the Report and Recommendation, the panel – after examining the state disciplinary charges against Robert B. Surrick and analyzing the disposition of those charges in the extended state proceedings which culminated in a March 24, 2000 Opinion and Order of the Pennsylvania Supreme Court suspending Mr. Surrick from the practice of law for five years – concluded, on the authority of *Ruffalo v. United States,* 390 U.S. 544, 552, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968), "that Mr. Surrick has shown cause that discipline should not be imposed on him by this court." February 7, 2001 Report, p. 35. Accordingly, in the accompanying "Recommendation" the panel "recommended that discipline not be imposed on Robert B. Surrick." February 7, 2001 Recommendation.

On April 2, 2001, this court voted not to adopt the panel's February 7, 2001 Report and Recommendation. Pursuant to the April 2 vote, this court, as noted in an order entered by Chief Judge Giles on April 2, 2001, "determined that it will only give further consideration to the question of whether identical discipline to that imposed by the Pennsylvania Supreme Court through its Opinion and Order dated March 24, 2000 should be imposed by this Court." Thereafter, Chief Judge Giles appointed a three judge Ad Hoc Committee to make a recommendation to the court as to the discipline that should be imposed on Mr. Surrick.

On June 7, 2001, the Ad Hoc Committee presented to the Chief Judge its Recommendation – namely, that Mr. Surrick be suspended from practice before this court for thirty months. On June 11, 2001, a majority of this court voted to adopt the Recommendation of the Ad Hoc Committee.

When this court, on April 2, 2001, voted not to adopt the panel's February 7 Report and Recommendation, it did not file an opinion or other written statement presenting its reasons for rejecting the panel's February 7 analysis and recommendation. Nor did this court, in conjunction with its vote of June 11, 2001, file an opinion or other written statement explaining its disagreement with the panel's February 7 submission. Not having had the benefit of a recital by a majority of my colleagues of their reasons for concluding that the February 7 panel submission was flawed, I remain of the view that, pursuant to *Ruffalo,* this court, should not, on the record before it, impose discipline on Mr. Surrick. Accordingly, for the reasons presented in some detail in the panel's February 7 Report and Recommendation, I respectfully dissent.

June 11, 2001

Pollak, J.

Dalzell, J., *dissenting.*

June 11, 2001

I respectfully dissent from the Majority's unsought disapproval of our panel's February 7, 2001 Report and Recommendation and from the harsh discipline it has now imposed. I do so for two fundamental reasons.

First, the imposition of any discipline is unwarranted because the state court proceedings deprived Surrick of procedural due process within the meaning of our Rule of Disciplinary Enforcement II.D.1. Second, as suggested in my concurring opinion, the imposition of discipline by this Court would result in grave injustice, within the meaning

of our Rule of Disciplinary Enforcement II.D.3., because of (a) the unprecedented severity of the state discipline, and (b) the profound First Amendment interests that are violated by the imposition of such discipline.

I.

There is no point in rehearsing what Judge Pollak set forth in such detail and with such persuasiveness in his opinion for our panel on the subject of the procedural due process of which Surrick was so palpably deprived at the hands of the Commonwealth's highest tribunal. Even if our Disciplinary Rule IID.1 did not exist, two controlling United States Supreme Court precedents would compel the conclusion we reached in our panel opinion. *See In re Ruffalo*, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968) and *Theard v. United States*, 354 U.S. 278, 1 L. Ed. 2d 1342, 77 S. Ct. 1274 (1957).

Though a narrow majority of this Court thinks otherwise, the deprivation of procedural due process is therefore obvious and requires the result our panel recommended.

II.

As suggested in my concurring opinion, the imposition of the same discipline would result in grave injustice within the meaning of Rule of Disciplinary Enforcement II.D.3. Although the First Amendment interests are, of course, transcendent, there are in fact two reasons to apply the "grave injustice" standard here.

A.

It remains undisputed and indisputable that the discipline imposed in Surrick's case is uniquely and unprecedentedly harsh. In colloquy with me at the September 20, 2000 oral argument, the Office of Disciplinary Panel's able advocate acknowledged that he could cite no other case in Pennsylvania disciplinary jurisprudence which suspended for any such time any Pennsylvania lawyer for filing a recusal motion.[1] This may by itself explain why, even after the Pennsylvania Supreme Court's remand regarding Anonymous Attorney A, the Disciplinary Board nevertheless only recommended a public censure for Surrick's August 11, 1992 filing in the Pennsylvania Superior Court. The five-year suspension came, quite literally, unbidden and out of the blue.

In imposing a five-year suspension, the filing of a motion for recusal in an appellate court was thus given the equivalence of a conviction of a felony, as recently witnessed by the five-year suspension imposed on former Pennsylvania Attorney General Ernest Preate, who pled guilty to federal mail fraud and received a fourteen month prison sentence for it. *See The Legal Intelligencer*, March 22, 2001, p. 1. By contrast, all Surrick did was, at worst, ruffle some judicial feathers in his written criticism of four public figures. Such discipline is far beyond the pale and utterly out of proportion to what Surrick did on August 11, 1992. In short, this Draconian discipline constitutes "grave injustice" and this Court should be the last institution to

[1] At the May 22, 2001 hearing before the second panel, disciplinary counsel reiterated this concession.

perpetuate any aspect of that injustice – much less thirty months of it – under our own Rules.

B.

As suggested in my concurring opinion, there are also profound First Amendment interests in play in this case.

At the outset, and as the concurring opinion stated, there is no question that a courtroom is not a free speech zone on the order of a public square or the Internet. To the contrary, the law and the judges who administer that law must keep very tight control of what occurs in the courtroom in areas ranging from, in our courts, the application of the Federal Rules of Evidence[2] to courtroom civility and decorum. It is crucial, however, to recall that none of those interests is threatened by the written motion Surrick filed in the Pennsylvania Superior Court on August 11, 1992.

In filing his anticipatory motion for recusal, Surrick challenged the integrity of four elected judges in the Commonwealth of Pennsylvania, and did so with some strong language. A look at one of those four judges will illuminate the core First Amendment interests at stake here.

Surrick feared that there were ex parte communications involving Supreme Court Justice Rolf Larsen in an earlier case, and that Delaware County Common Pleas judges were in league with Justice Larsen, to the disadvantage of Surrick and his clients. As Judge Greenberg of

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[2] *See*, e.g., Fed. R. Evid. 611(a).

our Court of Appeals later rehearsed the sordid history, Larsen, besides being in 1994 impeached and removed from office in the Pennsylvania General Assembly, was the subject of an investigation by the Pennsylvania Judicial Inquiry Review Board ("JIRB"). *See Larsen v. Senate of the Commonwealth of Pennsylvania*, 154 F.3d 82, 85 (3d Cir. 1998). As Judge Greenberg reported in *Larsen*, the JIRB, "following an investigation into allegations of misconduct, reported to the Pennsylvania Supreme Court that Larsen had created an appearance of impropriety by engaging in ex parte communications with a trial judge in a pending case." Interestingly, Justice Larsen's (unsuccessful) defense to this charge was that at least three other Justices "had engaged in various forms of misconduct involving ex parte communications, kickbacks, partiality toward litigants and interference in pending cases." *Id.*

Our Court of Appeals's decision in *Larsen* was not the only reason for my comment in footnote 2 of the concurring opinion that it is well past the time in Pennsylvania when one could reflexively attribute claims of such improper communications to lawyers' hyperactive imaginations. As Judge Greenberg did in *Larsen*, *id.* at note 1, I cited *Yohn v. Love*, 887 F. Supp. 773 (E.D.Pa. 1995), affd in relevant part 76 F.3d 508 (3d Cir, 1996), a case in which Judge Newcomer found, and our Court of Appeals affirmed, an ex parte communication between the former Chief Justice of Pennsylvania and an Assistant District Attorney during a criminal case. This ex parte communication led to that Chief Justice's direction to the trial judge to reverse an earlier, important evidentiary ruling in the middle of a criminal trial.

In both *Larsen* and *Yohn*, it is very hard to see how the ex parte misconduct could have been brought to light

unless a lawyer had the courage to do so. Indeed, as pointed out in footnote 2 of the concurring opinion, in less than twenty years no fewer than 266 judges in state courts around the country have been removed from office as a result of disciplinary proceedings, including many because of ex parte communications. *See* 22 Judicial Conduct Reporter 4, 6-7 (Summer, 2000). The conduct of which Surrick complained in his written motion, therefore, is scarcely unknown either in Pennsylvania or in the other state courts, and involves the heart of the judicial branch of government.

Experience in the federal courts, while much happier in this regard than that just canvassed in the state systems, is nevertheless instructive as to why written motions like Surrick's must be accorded Times-Button "breathing space".[3] In 1990, Congress created the National Commission on Judicial Discipline and Removal ("NCJDR"), *see* Judicial Improvement Act of 1990, Pub. L. No. 101-650, tit. IV, § 410, 104 Stat. 5089, 5124. The counsel to the NCJDR and a researcher from the Federal Judicial Center who worked with him published their exhaustive research on judicial misconduct complaints under 28 U.S.C. § 372(c), Jeffrey N. Barr & Thomas E. Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. Pa. L. Rev. 25 (1993).

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[3] *See NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405 (1963) ("First Amendment freedoms need breathing space to survive"); *New York Times v. Sullivan*, 376 U.S. 254, 279, 84 S. Ct. 710, 725, 11 L. Ed. 2d 686 (1964) ("would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.").

Although Barr and Willging found that the great majority of the 2,405 § 372(c) filings they studied were without merit, they did find forty-four cases where corrective action was taken, including three where Article III judges were ultimately impeached. Of telling First Amendment significance to Surrick's case, however, was the authors' report of interviews "from the Public Integrity Section of the Department of Justice [who] expressed misgivings about filing complaints" against federal judges. Quoting a research paper of Professor Todd Peterson about those interviews, the authors reported that

> the attorneys were incredulous at the suggestion that a Department attorney would risk souring relations between the Department and a federal judge by making a complaint under the 1980 Act. The absence of complaints from federal attorneys coincided with reports from the same interviewees that federal judges sometimes exhibit signs of an 'arrogant and arbitrary exercise of authority' that includes 'sexism and racism in the treatment of attorneys.' Given the power and influence of the Department of Justice, one can imagine that the average practitioner would be at least as timid in risking their personal reputation or that of their law firm.

Id. at 149 (citations to Professor Peterson's research paper omitted).[4]

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[4] It is certainly true that lawyers who do not often appear in this district, especially out of district lawyers, do not have the institutional constraint Department of Justice lawyers do. But this limited circumstance does not apply to lawyers like Surrick who regularly have practiced in our district.

Even before Surrick's case, it was apparent that any lawyer had to swallow hard before he or she risked filing a motion to recuse, given the fears Barr and Willging cited. But because, as I mentioned in my concurring opinion, lawyers are effectively sentries for the public when they detect judges' ethical breaches, they must have *Times-Button* "breathing space" in this heartland of the administration of justice if they are to take that grave risk.[5]

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[5] We are not the first to notice this First Amendment dimension. *See*, e.g., Judge Kozinski's opinion for the Court in *Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman*, 55 F3d 1430, 1437-38 (9th Cir. 1995) (Times constrains district court attorney disciplinary standards) and 1441 (lawyer has First Amendment right to refer to a federal judge as, e.g., "dishonest," "ignorant," "a buffoon," "a bully," and "a right wing fanatic"). The pertinent epithets were made in the lawyer's letter to the publisher of the Almanac of the Federal Judiciary, in response to the subject judge's request for an amendment to his profile therein. The offending letter is worth quoting so it may be compared with the content of Surrick's motion:

> It is outrageous that the Judge wants his profile redone because he thinks it to be inaccurately harsh in portraying him in a poor light. It is an understatement to characterize the Judge as "the worst judge in the central district [of California]." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this substandard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend . . . , like the Judge, is a right-wing fanatic.

Id. at 1434 n.4.

The lawyer in question also told a reporter that the judge was "drunk on the bench" and given to "anti-semitism," *id.* at 1434.

The Pennsylvania Supreme Court and now the narrowest majority of this Court have made a lawyer's filing of a motion to recuse a professionally suicidal act. Surely the First Amendment exists to prevent such self-immolation on the part of those citizens in the best position to detect judicial misconduct and bring it to public light.

III.

There is also a certain surreality to the imposition of discipline in this Court given that no one has asked for it. The Office of Disciplinary Counsel, no wilting flower in these cases, interposed no objection to either the Report and Recommendation or the concurring opinion. While this silence does not foreclose this Court's right to examine Surrick's case de novo, to expend such energy for so long in such a procedural context seems a peculiar expenditure of precious judicial time.

While not an advisory act under U.S. Const. Art. III, § 2, the Court's unsought action to reach such an unwarranted result is odd and disquieting. Indeed, those who believe, as I do, that the First Amendment protects values at the core of our polity will share my particular disquiet that Article III judges could be so unnerved by the possible application of those values in this extreme case that they have acted as they have where there is really no case and only controversy of their own making.

Stewart Dalzell, J.

Fullam, S.J., *dissenting*.

June 12, 2001

I join in the dissenting opinion of Judge Pollak, and in Parts I and II-A of the dissenting opinion of Judge Dalzell.

Katz, S.J., *dissenting*.

June 13, 2001

I respectfully dissent. I believe the discipline imposed is excessive and a gross overreaction, resulting in a grave injustice within the meaning of the Rule. On balance, it does more harm to the institution than to Mr. Surrick.

Clarence C. Newcomer, S.J., *dissenting*.

June 12, 2001

With great respect for the opinions of those of my brethren who see this case differently, I wish to be recorded as joining the dissent of Judge Pollak for the reasons he so eloquently set forth in his original opinion and in his most recent dissent.

Thomas N. O'Neill, Jr., J., *dissenting*.

June 12, 2001

I wish to be recorded as joining in Judge Pollak's dissent in this matter.

Clifford Scott Green, S.J., *dissenting*.

I join in the dissenting opinion of Judge Pollak.

John R. Padova, J., *dissenting*.

June 14, 2001

I wish to be recorded as joining in the dissent opinion of Judge Pollak.

Bruce W. Kauffman, J., *dissenting*.

June 14, 2001

Please record me as joining in the dissent opinion of Judge Pollak

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	MISCELLANEOUS
ROBERT B. SURRICK	:	NO. 00-086

ORDER

(Filed Jun. 14, 2001)

AND NOW, this 11th day of June, 2001, the court having considered at a meeting this date the Report and Recommendation of the three judge panel that discipline be imposed against Robert Surrick, Esquire under Local Rule of Civil Procedure 83.6II(D)(4) in the form of suspension from practice in this court for thirty (30) months calculated from April 24, 2000, and a majority of judges having voted to adopt the Report and Recommendation of the three judge panel, it is hereby ORDERED that Robert Surrick, Esquire is suspended from practice before this court for a period of thirty (30) months, commencing April 24, 2000, which is the date that his sixty (60) month suspension from state practice by the Supreme Court of Pennsylvania became effective.

BY THE COURT:

/s/ James T. Giles
JAMES T. GILES, C.J.

United States District Court, E.D. Pennsylvania.

In the Matter of Robert B. SURRICK.

No. MISC. 00-086.

REPORT AND RECOMMENDATION

Feb. 7, 2001.

Pollak, Dalzell, and Padova, JJ.

Introduction

A.

On March 24, 2000, the Pennsylvania Supreme Court filed an opinion and accompanying order in a proceeding captioned *Office of Disciplinary Counsel v. Robert B. Surrick,* 561 Pa. 167, 749 A.2d 441 (Pa.2000). The first paragraph of the court's opinion states the question addressed by the court and the court's resolution of it:

> This court is presented with the question of whether the evidence was sufficient to establish respondent's culpability on two charges that he violated Rule of Professional Conduct 8.4(c)[1] (hereinafter RPC). The precise issue to be resolved is whether respondent acted with reckless disregard for the truth when he leveled accusations of case fixing against certain jurists in a pleading filed in the Superior Court of Pennsylvania. For the reasons set forth herein, we find that respondent did violate RPC 8.4(c) on both

[1] RPC 8.4(c) states: It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

> counts and that the appropriate discipline is a five year suspension from the practice of law.

749 A.2d at 442.

Robert B. Surrick, the respondent in *Office of Disciplinary Counsel v. Robert B. Surrick,* is an attorney admitted to practice before this court.[1] Accordingly, pursuant to Rule II(B)(2) of this court's Rules of Disciplinary Enforcement (promulgated and codified under Rule 83.6 of this court's Local Rules of Civil Procedure), Chief Judge Giles, on May 10, 2000, issued an order to show cause which, taking note of the discipline imposed by the Pennsylvania Supreme Court, called upon respondent Surrick to (in the words of Rule II(B)(2)), "inform this court 30 days after service . . . of any claim . . . predicated upon the grounds set forth in [Rule II(D)] hereof that the imposition of the identical discipline by the court would be unwarranted and the reasons therefor."

Rule II(D) provides as follows:

> D. upon the expiration of 30 days from service of the notice issued pursuant to the provisions of [II(B)] above, this court shall impose the identical discipline unless the respondent-attorney demonstrates, or this court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

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[1] Mr. Surrick was admitted to the bar of this court on November 20, 1970.

> 1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> 2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or
>
> 3. that the imposition of the same discipline by this court would result in grave injustice; or
>
> 4. that the misconduct established is deemed by this court to warrant substantially different discipline.
>
> Where this court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

On June 9, 2000, respondent Surrick, through counsel, filed his Answer to Order to Show Cause. In that Answer, respondent contends that three of "the grounds set forth in [RuleII(D)]" preclude "the imposition of . . . identical discipline":

> (1) "First", respondent contends that the Supreme Court of Pennsylvania, in imposing discipline in 2000 for action taken over seven years before, has invoked a more inculpatory substantive standard than was part of the governing disciplinary law of Pennsylvania in 1992, at the time of respondent's conduct, and has applied that standard through a more demanding procedural regime than was thought applicable in 1995, when the Disciplinary Board's Special Hearing Committee conducted the evidentiary hearing in respondent's case – a form of assertedly retroactive adjudication, both substantive

> and procedural, viewed by respondent as having "violated Mr. Surrick's federal due process rights."
>
> (2) "Second, there is an infirmity of proof establishing the misconduct such that the Court should not accept as final the Supreme Court's conclusion on the subject. . . . "
>
> (3) "Finally, the imposition of the same discipline by the Court as the Supreme Court of Pennsylvania would result in grave injustice to Mr. Surrick. What is striking about the years since Mr. Surrick was appointed to the JIRB [the former Judicial Inquiry and Review Board] is that all the lawsuits and disciplinary proceedings initiated against Mr. Surrick have [been] based on speech. . . . To suspend Mr. Surrick's license for five years for that speech punishes what is at the heart of the First Amendment."

Further respondent notes, in his Answer to Order to Show Cause, that the sanction of "Public Censure" recommended by the Disciplinary Board of the Pennsylvania Supreme Court ("Disciplinary Board" or "Board") was, "*sua sponte* and without briefing," changed by the Supreme Court into a five-year suspension of Mr. Surrick's license to practice law.

On August 8, 2000, this court, acting pursuant to Rule II(F) of the Rules of Disciplinary Enforcement, appointed the Office of Disciplinary Counsel – the law office which, in 1994, initiated disciplinary proceedings against respondent and carried the proceedings forward through the Supreme Court's opinion and order of March 24, 2000 – to serve as counsel prosecuting the proceedings in this court.

On September 20, 2000, oral argument was held before the panel of this court that Chief Judge Giles appointed.[2]

B.

In Part I of this opinion, we present the procedural history of the lengthy state disciplinary proceedings. We undertake to set forth this history in some detail, with a view to providing an understanding of the genesis of the issues that are now presented to this court. We begin by listing the original charges against respondent, as formulated by Disciplinary Counsel. We then summarize the sequential rulings of (1) the Special Hearing Committee appointed by the Disciplinary Board; (2) the Disciplinary Board; (3) the Pennsylvania Supreme Court; (4) the Disciplinary Board, on remand from the Pennsylvania Supreme Court; and (5) the Pennsylvania Supreme Court.

In Part II of this opinion, we address the question whether, on the record made in the state disciplinary proceedings, this court should impose on respondent Surrick discipline identical to that the Pennsylvania Supreme Court imposed.

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[2] After Chief Judge Giles's May 10, 2000 Order, Mr. Surrick's brother, the Hon. R. Barclay Surrick, became a member of this court. As a result, we solicited the parties' views as to whether the Rule of Necessity required this panel to proceed, notwithstanding this development. Both parties agreed we should proceed. As there is no other tribunal that can interpret our Local Rules to determine who should be permitted to practice before this court, we share the parties' view on this point.

I.

The Initial Charges Against Mr. Surrick

The conduct which gave rise to the Pennsylvania disciplinary proceedings against Mr. Surrick was his August 11, 1992 filing in the Pennsylvania Superior Court, of a "Motion for Recusal of Certain Superior Court Judges and Senior Judges Assigned to the Superior Court."

That motion, submitted in connection with the appeal of a case captioned *Leedom v. Spano* – an appeal in which Mr. Surrick was acting as counsel for one of the parties, and was himself a party in interest – was filed prior to announcement by the Superior Court of the composition of the three-judge panel which would hear the appeal.

On November 22, 1994, some two years after the filing by Mr. Surrick of the recusal motion, the Office of Disciplinary Counsel filed with the Disciplinary Board a Petition for Discipline of Mr. Surrick.

The Petition for Discipline contained five charges. The charges may be grouped in three categories. (1) Three of the charges addressed statements in the recusal motion – statements about Common Pleas Judge Harry J. Bradley and Superior Court Judges Peter Paul Olszewski and Vincent Cirillo which were alleged to be false. (2) The fourth charge alleged that the motion for recusal was filed prematurely. (3) The fifth charge alleged that a reference in the recusal motion to disciplinary proceedings involving Arthur Levy, a former law partner of Mr. Surrick's, compromised the confidentiality of those proceedings.

The charged conduct, together with the rules said to have been violated, are as follows:

1. The statements about the three judges:

(i) The recusal motion contained the following statement about Judge Bradley:

It is believed and averred by Movant Surrick that Judge Bradley was "fixed" by the Delaware County Republican Organization as a result of a deal between that organization and Justice Larsen whereby Justice Larsen would again exert his political influence on behalf of Judge McEwen who was again seeking to fill a vacant Supreme court seat and, in return, the Delaware County Republican Organization, through its control of the Delaware county Judges, would fix this case.

(ii) The recusal motion contained the following statement about Judge Olszewski:

In litigation arising out of the termination of the Surrick/Levy law practice . . . Upon appeal to the superior court, judge Olszewski dismissed the appeal not on the basis of anything in the record *or any issue raised by opposing counsel* but on the basis of an alleged procedural defect in the record. Even the most cursory examination of the record will reflect that the alleged defect in the Record relied upon by Judge Olszewski does not and did not exist. It is the belief of Movant Surrick that the decision of Judge Olszewski was based upon outside intervention, as it could not have resulted from any rational legal analysis of the Record.[3]

[3] The quoted recusal motion excerpts are taken from the opinion of the Pennsylvania Supreme Court (749 A.2d at 442-43), which undertook

(Continued on following page)

(iii) In the recusal motion, Mr. Surrick stated that Judge Cirillo had told him that "you are keeping me off the Supreme Court." (This remark was said by respondent to have taken place at a bar association luncheon).

Based on the alleged falsity of these statements, the Office of Disciplinary Counsel charged Mr. Surrick with violating the following Pennsylvania Rules of Professional Conduct ("RPC"):

RPC 3.3(a)(1):

(a) A lawyer shall not knowingly

(1) make a false statement of material fact or law to a tribunal.

RPC 8.2(b):

A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officers.

RPC 8.4(c):

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

RPC 8.4(d):

It is professional misconduct for a lawyer to engage in conduct which is prejudicial to the administration of justice.

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to reproduce them verbatim, with italicization and upper-and-lower case, from the recusal motion as filed.

2. The fourth charge was that the recusal motion was filed prematurely since, at the time it was filed, the Superior Court had not yet announced the composition of the panel that was to hear the appeal of which the recusal motion was the subject. Based on the alleged prematurity of the recusal motion, Disciplinary Counsel charged Mr. Surrick with violating RPC 3.1, which provides as follows:

> A lawyer should not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

3. The final charge against Mr. Surrick was that the reference in the recusal motion to Mr. Levy's disciplinary proceedings contravened Rule 402(a) of the Pennsylvania Rules of Disciplinary Enforcement, which provides that:

> All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential until or unless . . . (2) the respondent attorney requests that the matter be public, or waives confidentiality for a particular purpose specified in writing.

Special Hearing Committee

A Special Hearing Committee ("Committee") of the Disciplinary Board conducted hearings on July 26, 27 and 28, 1995. The hearings were held in open court in the Montgomery County Courthouse, Mr. Surrick having

waived confidentiality. On January 17, 1997, the Committee filed its Report and Recommendation. The findings and conclusions of the Committee were, in summary, as follows:

> 1. *The statements about the three judges*
>
> The Committee found that "Judge Bradley was not influenced in his decision [in *Leedom v. Spano*] by any outside intervention," that there had been "no evidence presented by Respondent [Mr. Surrick] that Judge Olszewski based his decision upon any outside intervention:" and that "Judge Cirillo testified that he did not remember the incident."

Noting that RPC 3.3(a)(1) proscribes "*knowingly* mak[ing] a false statement of material fact to a tribunal" and that RPC 8.2(b) proscribes "*knowingly* mak[ing] false accusations against a judge", the Committee determined that under Pennsylvania law "the offending statements must be knowingly false" and [t]here was no evidence presented that respondent *knew* that the accusations made were false" [emphasis added in Committee opinion].[4]

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[4] The Committee did not separately analyze RPC 8.4(c) ("engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation") or RPC 8.4(d) ("engag[ing] in conduct which is prejudicial to the administration of justice"). It is a plausible inference that the Committee, by implication, imported into RPC 8.4(c) the "knowing" standard of RPC 3.3(a)(1) and RPC 8.2(b) when the act alleged to constitute "dishonesty, fraud, deceit or misrepresentation" is a "statement . . . to a tribunal" (Rule 3.3(a)(1)) or is an "accusation . . . against a Judge" (Rule 8.2(b)). Whether the Committee, by implication, adopted a similar construction of a "statement to a tribunal" or an "accusation . . . against a Judge" which is said to constitute "conduct prejudicial to the administration of justice" within the meaning of Rule 8.4(d) is less clear.

(Continued on following page)

2. *The prematurity of the recusal motion*

> . . . [R]easonable minds may indeed agree that the Motion was filed before it was ripe for decision by the Court. However, the evidence suggests that Respondent's timing was motivated by a desire to avoid the difficult and ticklish situation occasioned by the presentation of Motion to Recuse at the last minute when the panel was announced. In any event, it seems incomprehensible that a lawyer could be disciplined merely because he filed a motion before it was ripe for a decision by the Court. Accordingly, the panel recommends that the charge asserting a frivolous claim based upon the early filing of the motion be dismissed.

3. *The confidentiality of the disciplinary proceedings involving Mr. Levy*

> We conclude that the partner's [Mr. Levy's] interest in the confidentiality of these proceedings was waived by his own conduct and that of his attorney in disclosing the proceedings and its outcome.

Based on these findings and conclusions, the Committee, in its January 17, 1997 Report and Recommendation, recommended to the Disciplinary Board "that all the charges brought against Respondent should be dismissed . . ."

Perhaps the Committee found – but did not record the finding – that the recusal motion did not have any detrimental impact on "the administration of justice."

The First Decision of the Disciplinary Board

The Office of Disciplinary Counsel filed exceptions to the Committee's Report and Recommendation and requested oral argument before the Disciplinary Board.

Argument was heard by a three-Member panel of the Board on April 18, 1997. On October 17, 1997, the Board filed an Order and accompanying Opinion. *Office of Disciplinary Counsel v. Robert B. Surrick,* No. 101 DB 94 (Oct. 17, 1997). The Board's findings and conclusions were, in summary, as follows:

1. *The statements about the three judges*

> 1. With respect to Mr. Surrick's statements about the three judges, the Board made the following findings of fact:
>
> * * *
>
> 25. In its opinion filed on July 22, 1994, the Superior Court vacated the judgment against the Surricks in the *Leedom v. Spano* lawsuit. (PE 6).
>
> 26. Petitioner [Disciplinary Counsel] proved that Respondent's allegation that Judge Bradley's decision to mold the verdict against the Surricks was the result of a "fix" or any "deal" involving the Delaware County Republican Organization, former Supreme Court Justice Rolf Larsen or Superior Court President Judge Stephen J. McEwen was untrue.
>
> 27. The Respondent submitted sufficient evidence to support his *belief* that the allegations set forth in his Motion for Recusal were not false.

28. Petitioner failed to prove, by a preponderance of evidence, that respondent has actual knowledge that the allegations concerning Judge Bradley as set forth in his Motion for Recusal were false.

* * *

34. Petitioner proved that Respondent's allegation that Judge Olszewski's decision in *Surrick v. Levy,* [the opinion for the Superior Court dismissing, on procedural grounds, Mr. Surrick's appeal in *Surrick v. Levy*] "was based upon outside intervention" was untrue.

35. Respondent submitted sufficient evidence to support his *belief* that the allegations set forth in his Motion for Recusal were not false. (T. 207-252) (RE 3, 4).

36. Petitioner failed to prove, by a preponderance of evidence, that Respondent had actual knowledge that the allegations concerning Judge Olszewski, as set forth in his Motion for Recusal were false.

* * *

39. Petitioner proved that Respondent's allegation that Judge Cirillo confronted him at a Philadelphia Bar reception and stated, "Surrick, you are keeping me off the Supreme Court" was untrue.

* * *

43. Respondent submitted sufficient evidence to support his belief that Judge Cirillo approached him at the Bar function and

> said, "Surrick, you are keeping me off the Supreme Court."
>
> 44. Petitioner failed to prove, by a preponderance of evidence, that Respondent had actual knowledge that the allegations concerning Judge Cirillo, as set forth in his Motion for Recusal were false.

In its conclusions of law, the Board held that proof of a violation of RPC 3.3(a)(1) requires a showing "by a preponderance of the evidence" that the accused lawyer "had actual knowledge of the falsity of the statement of material fact made to a tribunal." Similarly, the Board held that proof of a violation of RPC 8.2(b) requires a showing "by a preponderance of the evidence" that the accused lawyer "had actual knowledge of the falsity of the accusation against a judge or other adjudicating officer." In arriving at these conclusions of law, the Board rejected the Office of Disciplinary Counsel's "view, [that] an objective standard of reckless disregard of the truth of the statements should be applied." Such a construction, the Board held, could not be squared with "knowingly," the key word in both Rules, defined by the Terminology Section of the Rules of Professional Conduct to signify "actual knowledge of the fact in question."[5]

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[5] In footnote 1 of its opinion, the Board stated:

> Petitioner's reliance on the Model Rules of Professional Conduct is misplaced. While it is true that the Rules of Professional Conduct were derived from the Model Rules, they were not adopted in full. The Supreme Court rejected certain language contained in the Model Rules and inserted new language. In fact, the Supreme Court specifically rejected Rule 8.2 of the Model Rules' "reckless disregard of the

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Thus, the Board concluded that "[u]nder the Board's interpretations of Rule 3-3(a)(1) and 8.2(b), Petitioner's [Office of Disciplinary Counsel's] evidence was insufficient to support a finding of a violation of either of these rules."

In similar vein, the Board concluded that Disciplinary Counsel:

> failed to prove a violation of Rule of Professional Conduct 8.4(c). While Rule 8.4(c) does not specify the level of intent required for a violation to occur, the common meaning of the descriptive words within the Rule, "dishonesty, fraud, deceit and misrepresentation," necessitates that the prohibited conduct be intentional, and not merely negligent or careless. The Board recently considered this issue in *Office of Disciplinary Counsel v.* [*Anonymous Attorney A*], No. 28 DB 95 (Apr. 23, 1997), which involved a district attorney's failure to disclose reciprocal discovery material to the defendant, as well as, his alleged misrepresentations to the court and defense counsel that such disclosure had occurred. In that decision, the Board determined that negligent or careless conduct was not sufficient to constitute a violation of Rule 8.4(c). For the same reasons which support our [*Anonymous Attorney A*] decision, it is the Board's opinion that petitioner failed to prove, by a preponderance of the evidence, that

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truth" standard in favor of the "knowingly false" standard. In choosing "knowingly false" over "reckless disregard," the Supreme Court obviously intended for a stricter standard to apply. Bound by the Supreme Court's decision, we are unable and unwilling to adopt a standard specifically rejected by the Court.

> Respondent's conduct was deliberate and intentional and not the result of negligence or carelessness and therefore, failed to meet its burden in establishing respondent's violation of Rule of Professional Conduct 8.4(c).
>
> The Board has adopted the Special Hearing Committee's general finding that the Respondent submitted sufficient evidence to support his belief that the allegations contained in his Motion for Recusal were not false. Therefore, absent evidence to rebut this belief, it cannot be found that Respondent engaged in deliberate and intentional deception when he submitted the Motion for Recusal.
>
> Petitioner argues that Rule 8.4(c) is violated when a lawyer acts in "careless disregard for the truth." Again, Petitioner's argument is not supported by the Rules. In petitioner's view, Respondent attacked members of the Pennsylvania judiciary without adequately verifying the accuracy of his statements. In doing so, Respondent acted with "careless disregard" and thereby violated Rule 8.4(c). To adopt such an interpretation would not only be contrary to the Rules, but also create uncertainty as to the amount of 'due diligence" necessary for "adequate verification." Therefore, it is the Board's opinion that a proper interpretation of the Rules requires rejection of Petitioner's argument consistent with our opinion in [*Anonymous Attorney A*].

Turning to Rule 8.4(d) ["conduct prejudicial to the administration of justice"], the Board held:

> Like Rule 8.4(c), Rule 8.4(d) does not specify the level of intent required to violate this Rule. It is the Board's opinion that conduct in violation of

> Rule 8.4(d) must likewise be intentional, and not merely negligent or careless. The Board further believes proof that the conduct was prejudicial to the administration of justice is required.
>
> * * *
>
> In the instant case . . . it is the view of the Board that Petitioner failed to sustain its burden in proving Respondent's conduct violated Rule 8.4(d). First . . . the Respondent submitted some, albeit weak, evidence to support his belief that his allegations were not false. This evidence was largely unrebutted.
>
> More importantly, it is the Board's view that Petitioner failed to prove Respondent's conduct interfered significantly with the administration of justice. From the evidence submitted, it was clear that Respondent, by this time, had developed a reputation for making baseless and unsubstantial allegations against certain members of the judiciary. For the most part, he was and is ignored by everyone familiar with his predilection. Therefore, it is unclear, given his reputation, how his allegations interfered with the administration of justice.

Finally, the Board agreed with the Special Hearing Committee's rulings that the filing of the recusal motion was not "frivolous" (RPC 3.1) and that the reference to Mr. Levy's disciplinary proceeding was not a breach of confidentiality since Mr. Levy had already "waived his right to the confidentiality of the disciplinary proceeding when he referred to the case, by name, in a brief filed before the Pennsylvania Superior Court."

Accordingly, the Board, in *Office of Disciplinary Counsel v. Robert B. Surrick,* 101 DB 94 (1997), ordered the charges against Mr. Surrick dismissed.[6]

The Pennsylvania Supreme Court remands the case to the Disciplinary Board

On November 10, 1997, approximately three weeks after the Board's decision in Mr. Surrick's case, the Office of Disciplinary Counsel petitioned the Pennsylvania Supreme Court for Allowance of Appeal. "This court" – as the Pennsylvania Supreme Court subsequently explained – "remanded the matter to the Disciplinary Board on April 14, 1998, directing the Board to review the actions of respondent in accordance with this court's opinion in *Office of Disciplinary Counsel v. Anonymous Attorney A,* Pa. 223, 552 Pa. 223, 714 A.2d 402 (1998)."[7] *Surrick,* 749 A.2d at 443. In *Anonymous Attorney A,* the Pennsylvania Supreme Court reversed a decision of the Board – No. 28 DB 95 – on which the Board had relied in dismissing the RPC 8.4(c) charge against Mr. Surrick. The court held that a "*prima facie* violation of Rule 8.4(c)" is made out where a "misrepresentation is knowingly made, or where it is made with reckless ignorance of the truth or falsity thereof. . . . [N]o actual knowledge or intent to deceive . . . is necessary to establish a *prima facie* violation; the element of scienter is made out if Respondent's conduct was reckless, to the

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[6] One Board Member filed a concurring opinion; two Board Members dissented, concluding that respondent had violated RPC 8.4(c); one Member recused herself; one Member abstained; one Member did not participate.

[7] See footnote 12, *infra.*

extent that he can be deemed to have knowingly made the misrepresentation." *Id.*

On Remand: the Disciplinary Board's Report and Recommendation

On June 12, 1998, the Chair of the Disciplinary Board entered an order directing that, in light of the Pennsylvania Supreme Court's order remanding the Surrick matter "for further proceedings," the "above matter shall be scheduled for Re-Argument before a Three Member Panel," with the parties "directed to be prepared to argue the specific facts of record relevant to the new standard established in the [*Anonymous Attorney A*] Opinion." The three-member panel heard argument on September 28, 1998.

On April 1, 1999, the Board filed its second opinion. The portions of the opinion that applied the *Anonymous Attorney A* construction of RPC 8.4(c) to the charges against Mr. Surrick are as follows:

> Petitioner contends that Respondent's basis for his beliefs were not reasonable, but were founded on exaggerations and mischaracterizations. Petitioner argues there is no evidence of record that Respondent undertook an investigation of his theories prior to making them, or even understood the consequences of his actions.
>
> In order to determine whether Respondent's allegations were made with reckless ignorance of the truth or falsity of the matter, and therefore violated 8.4(c), it is necessary briefly to review the basis for statements made by Respondent against each of three judges, and the facts available to the Respondent at the time he made these statements.

Respondent's alleged basis for making the allegation that Judge Bradley was "fixed" centers on what he claims is a long-standing animosity in Delaware County against him, due to his adverse relations with Justice Rolf Larsen and Larsen's alliance with the Republicans. According to Respondent, Judge Bradley had a powerful Republican mentor in Delaware County and was thus influenced by this mentor and in turn by Larsen, who was known to interfere in lower court proceedings. Respondent was aware that he and his attorney, a respected member of the bar, were led to believe by Judge Bradley that he would grant the Motion for Directed Verdict and they were free to leave the courthouse, which they did. Respondent's attorney testified that he never would have left without assurance that the motion would be granted. Respondent was aware that he was not permitted to argue his post-trial motion in response to the molded verdict, nor was he given any explanation concerning the molded verdict. Respondent believes that based on these facts and his belief concerning Larsen's influence, there is no explanation for the molded verdict other than a "fix" on the case.

These facts provide a basis, albeit a somewhat weak one, for Respondent's assertions. Respondent did not deliberately close his eyes to facts which would have disproven his allegations but merely chose to view the available facts in the most negative fashion. In essence, the Respondent "views the world through dirty windows." For this reason, we find the Respondent's allegations regarding Judge Bradley in the Motion to Recuse, were not reckless within the meaning of *Office of Disciplinary Counsel v. Anonymous Attorney A*, 552 Pa. 223, 714 A.2d 402 (Pa.1998).

In the Judge Cirillo matter, the Respondent points to several facts as the alleged basis for his allegations. First, Respondent and Judge Cirillo did attend a Bar function on March 23, 1993. Further, Respondent did criticize Judge Cirillo because the Judge allegedly appointed his campaign treasurer to a lucrative receivership. The Judge was, in fact, running for the Supreme Court at that time and Respondent's criticism was carried in major newspapers in Pennsylvania around the time of the bar function. Finally, immediately after the alleged confrontation, Respondent told other persons of his alleged confrontation with the Judge. Even though Judge Cirillo denies the confrontation, there are sufficient facts to preclude a determination that respondent's conduct was reckless.

In the Judge Olszewski matter, however, the record demonstrates that Respondent ignored facts which refuted his beliefs. Indeed, Respondent had no direct information that the Judge was influenced by outside forces as he alleged. In fact, when respondent was asked at the disciplinary hearing for the basis of his beliefs regarding Judge Olszewski, he stated that his beliefs were based on conjecture and theory. (N.T. 487). This alone establishes Respondent's recklessness.

Petitioner established the fact that the decision at issue was made by a three member panel of the Superior Court. Further, there was no evidence that Judge Olszewski improperly influenced his fellow panel members. Accordingly, we find that Respondent's allegation was reckless in that it was based on conjecture and ignored facts that demonstrated his assertions were baseless. Therefore, he violated Rule 8.4(c).

As the Board finds a violation of rule 8.4(c), it is now appropriate to make a recommendation of discipline. At the reargument, Respondent did not make a recommendation of disciplinary sanction, as he argued that the charges should be dismissed against him. Petitioner made a recommendation of a minimum sanction of public censure.

Respondent's allegation against Judge Olszewski that he was influenced in his decision making by outside intervention was baseless and unsubstantiated. This statement went to the heart of the Judge's professional integrity. This allegation was made in a public court document and discussed in detail at a hearing which was made public by Respondent's choice. Attorneys cannot expect to make such outrageous charges against members of the judiciary without adverse consequences. Respondent chose to make his statements in the forum of the public. The Board recommends that Respondent's sanction also be carried out in that same forum. The Board recommends that a public censure be imposed.[8]

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[8] *Office of Disciplinary Counsel v. Robert B. Surrick,* No. 101 DB 1994 (Remand Report and Recommendations, April 1, 1999) 27-30, 35. The Board also rejected respondent Surrick's contention that the retroactive application of the Pennsylvania Supreme Court's *Anonymous Attorney A* construction of RPC 8.4(c) to actions taken years before worked a denial of due process. *Id.* at 30-35, 714 A.2d 402.

In a concurring and dissenting opinion, three Board Members concluded that respondent's statement about Judge Bradley also contravened RPC 8.4(c). One Board Member filed a dissenting opinion concluding that the charges should be dismissed. One Board Member recused herself. Two Board Members did not participate.

The Decision of the Pennsylvania Supreme Court

Both Mr. Surrick and the Office of Disciplinary Counsel petitioned for review by the Pennsylvania Supreme Court. On July 19, 1999, that court directed that the matter be set down for argument and ordered "the parties . . . to address in their briefs the applicability *vel non* of *Office of Disciplinary Counsel v. Neil Werner Price* [*Office of Disciplinary Counsel v, Price,* 557 Pa. 166, 732 A.2d 599 (1999)], No. 486 Disciplinary Docket No. 3 (filed June 24, 1999)." *Price* was a disciplinary proceeding that involved, *inter alia,* questions of burden of proof and standard of proof in the processing of charges arising under RPC 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal") and RPC 8.2(b) ("A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officers"). (It will be recalled that violations of those rules had been among the several violations initially charged against Mr. Surrick, and that they had been dismissed by the Board in its initial decision; those charges had not, however, been revived by the Pennsylvania Supreme Court's remand order, which only directed the Board to reconsider the RPC 8.4(c) charge). In *Price* the court ruled as follows:

> Thus, to establish a *prima facie* case of making false statements or accusations as set forth in Rules 3.3.(a)(1) and 8.2(b), the Office of Disciplinary Counsel bears the initial burden of establishing that an attorney, based upon his own knowledge, made false allegations in a court pleading. This can be accomplished by presenting documentary evidence or testimony from the victims of the allegations stating that the allegations are false. The burden then shifts to the respondent to establish that he had an objective

> reasonable belief that the allegations were true, based upon a reasonably diligent inquiry.

732 A.2d at 604 (footnote omitted).

In directing the parties to address the applicability "*vel non*" of *Price* to Mr. Surrick's case, the Pennsylvania Supreme Court evidently was seeking guidance as to whether the procedures announced in *Price* as governing disciplinary proceedings under RPC 3.3(a)(1) and RPC 8.2(b) should also govern disciplinary proceedings under RPC 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation"), the single rule under which charges were still pending against Mr. Surrick.

Oral argument was heard by the Pennsylvania Supreme Court on November 16, 1999. On March 24, 2000 the court filed its opinion and order suspending for five years Mr. Surrick's license to practice law in Pennsylvania.

The opinion of the Pennsylvania Supreme Court may be summarized under six holdings:

First: The court ruled that the applicable burden of proof and standard of proof were those the court had announced the year before in *Price.*

Second: The court ruled that "[a] determination of misconduct in this case hinges upon whether respondent acted recklessly or with the support of a reasonable factual basis. Recklessness is shown by the 'deliberate closing of one's eyes to facts that one had a duty to see or stating as fact, things of which one was ignorant'. *Anonymous Attorney A.,* 714 A.2d at 406." *Surrick,* 749 A.2d at 444.

Third: The court found no merit in respondent Surrick's contention that application of *Anonymous Attorney A,* decided in 1999, to conduct that had taken place in 1992 would constitute a denial of due process:[9]

> Retroactive application of a new rule of law is a matter of judicial discretion. *Cleveland v. Johns-Manville Corp.,* 547 Pa. 402, 690 A.2d 1146 (1997). The threshold inquiry is whether a new rule has been announced. *Id.* A new rule of law is established where an abrupt and fundamental shift from prior precedent, upon which litigants may have relied, has occurred. *Blackwell v. Com. State Ethics Comm.,* 527 Pa. 172, 589 A.2d 1094 (1991).
>
> Although numerous cases involving violations of RPC 8.4(c) have been resolved by this tribunal, none of those cases raised a question of the mental culpability element of RPC 8.4(c) prior to *Anonymous Attorney A.* Violations of RPC 8.4(c) had been sustained in earlier decisions of this court where the conduct was intentional as well as where the conduct was negligent. *See Office of Disciplinary Counsel v. Holston,* 533 Pa. 78, 619 A.2d 1054 (1993) (Respondent forged a court document and lied about it to a judicial authority); *Office of Disiplinary Counsel v. Geisler,* 532 Pa. 56, 614 A.2d 1134 (1992) (Respondent made statements to his clients without knowing the accuracy of those statements). No precedent had declared only intentional conduct would violate RPC 8.4(c). Nor was it unforeseeable that this

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[9] As noted in footnote 8, *supra,* this contention had also been urged, unsuccessfully, upon the Board.

> court would interpret RPC 8.4(c) as applicable to misstatements made with reckless disregard for the truth or falsity thereof. *Anonymous Attorney A* did not create a new legal standard; it merely provided explicit clarification of existing law. Respondent's due process objection to consideration of his conduct under the recklessness standard is rejected.

749 A.2d at 444-45 (footnote omitted).

Fourth: The court likewise found no merit in respondent Surrick's contention that the procedural regime announced in *Price* was not properly applicable to the litigation of charges arising under RPC 8.4(c):

> Respondent asserts that *Price* is inapplicable as the conduct at issue in that case involved violations of RPC 3.3(a) and 8.2(b), which prohibit a lawyer from knowingly making a false statement; thus, the element of scienter therein is intentional. Whereas, the charges at issue in the instant case relate to RPC 8.4(c), which prohibits a lawyer from knowingly or recklessly making a statement in ignorance of the truth or falsity thereof. By adding the element of recklessness, respondent argues that something less than intentional conduct is at issue, and thus, a lesser burden should be placed upon the attorney in supporting his basis for making the allegations. Respondent argues that a subjective standard is more appropriate to a determination of whether or not a lawyer acted in a reckless manner as it focuses on the actions of the individual charged rather than looking at the conduct through the eyes of an ordinary reasonable lawyer.
>
> To substitute a subjective approach merely because a different rule of professional conduct is

> at issue is not a valid basis for distinguishing *Price* from the case at issue. The measure of whether conduct was reckless can be ascertained by an objective analysis.

749 A.2d at 445.

Fifth: Having determined the substantive content – *Anonymous Attorney A* – and the appropriate procedural apparatus – *Price* – of RPC 8.4(c), the court then undertook to review the evidence. On the basis of this review the court concluded that the Board had been correct in determining that Mr. Surrick's statement about Judge Olszewski had violated RPC 8.4(c), but had erred in determining that Mr. Surrick's statement about Judge Bradley had not violated RPC 8.4(c). In the course of its discussion of the merits of the charges, the court noted that since 1983, when Mr. Surrick, as a member of the former Judicial Inquiry and Review Board, cast a minority vote to remove former Supreme Court Justice Rolf Larsen, the respondent has perceived himself as engaged in battle with Pennsylvania's judicial establishment. "Respondent believes that since his unsuccessful attempt to have Justice Larsen removed from office, and because of his well known views on the subject of judicial reform in Pennsylvania, he has created powerful political and judicial enemies who have united in an effort to bring about his destruction.." *Id.* at 446, 732 A.2d 599. "Respondent uses his self-aggrandized role as the crusader for justice as a shield from any liability for his actions while simultaneously arguing that any judicial decision in contravention to his position proves that he is the victim of a judicial conspiracy. Respondent's personal views on judicial reform cannot excuse his reckless conduct in

bringing unsubstantiated accusations against individual members of the judiciary." *Id.* at 447, 732 A.2d 599.

Sixth: Finding that "[t]he conduct of respondent in this case merits a severe sanction," *id.* at 449, 732 A.2d 599, the court ordered that respondent Surrick be suspended from the practice of law for five years. The court did not address the fact that both the Office of Disciplinary Counsel and the Disciplinary Board had recommended "public censure" as the appropriate sanction.

II.

As noted at the outset of this opinion, respondent Surrick, in his Answer to Order to Show Cause, has advanced three arguments why this court should not impose punishment identical with that meted out by the Pennsylvania Supreme Court. One argument – essentially a challenge to the sufficiency of the evidence that respondent's statements about Judges Bradley and Olszewski were recklessly made – is that the Pennsylvania Supreme Court's adverse decision rested upon an "infirmity of proof." Mr. Surrick's other two arguments – that the adverse decision worked (1) a denial of due process and (2) abridged his free speech right to continue his longstanding criticism of Pennsylvania's judicial establishment – are of constitutional dimension. We turn first to due process.

In addressing Mr. Surrick's due process claims, we note that, if this court were to agree with Mr. Surrick that the process resulting in his five-year suspension from the Pennsylvania bar was constitutionally flawed, such a ruling would not of its own force destabilize the decision of the Pennsylvania Supreme Court suspending for five years Mr. Surrick's status as a Pennsylvania practitioner. The

Supreme Court of the United States is, of course, the only court that could have exercised authority to review that decision (*see District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and *Rooker v. Fidelity Trust Company,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)), and Mr. Surrick chose not to petition for certiorari.

As seen by Mr. Surrick, the due process problem has a double aspect – that both *Anonymous Attorney A*'s substantive construction of RPC 8.4(c) and *Price*'s burden of proof and standard of proof were (1) promulgated by the Pennsylvania Supreme Court (a) subsequent to Mr. Surrick's assertedly wrongful 1992 conduct and (b) subsequent to the 1995 evidentiary hearing before the Special Hearing Committee, and (2), as promulgated, represented major departures from the previously prevailing substantive al understanding and procedural framework of RPC 8.4(c).

We have noted that the Pennsylvania Supreme Court, in its *Surrick* opinion, dismissed Mr. Surrick's contention that *Anonymous Attorney A*'s 1998 construction of RPC 8.4(c) should not have been given retroactive application to respondent's 1992 conduct. "*Anonymous Attorney A* did not create a new legal standard; it merely provided explicit clarification of existing law." 749 A.2d at 445.[10] But this

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[10] In its recent opinion in *Fiore v. White,* 562 Pa. 634, 757 A.2d 842 (2000), the Pennsylvania Supreme Court has had occasion to reiterate this characterization of *Surrick*:

> In *Surrick,* the appellant challenged the retroactive effect of another decision to his case. The appellant claimed that our decision in *Anonymous Attorney A,* 552 Pa. 223, 714 A.2d

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recital is (at a minimum) in some tension with what the court had said in deciding *Anonymous Attorney A.* There, after reviewing prior Pennsylvania cases, the court said that "[g]iven the absence of precedent in Pennsylvania on the issue *sub judice,* we have looked to case law from other jurisdictions for guidance." 714 A.2d at 406. And after surveying the case law of sister jurisdictions, the court concluded that "[w]e find the standard expressed by the Supreme Court of Colorado in *Rader* [*People v. Rader,* 822 P.2d 950 (Colo.1992)] to be most appropriate in interpreting our Rule 8.4(c)." *Id.* at 407. Moreover, when the Pennsylvania Supreme Court remanded *Surrick* for reconsideration by the Disciplinary Board in the light of *Anonymous Attorney A,* the Chair of the Board, in setting the matter down for reargument before a Board panel, referred to the "new standard established in the [*Anonymous Attorney A*] opinion"[11] (although, to be sure, the Report and Recommendation filed by the Board, following reargument, rejected (as the Pennsylvania Supreme Court was later to do) respondent Surrick's contention that

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402 (1998) announced a new scienter requirement for establishing attorney misrepresentation as a violation of Pennsylvania's Rule of Professional Conduct 8.4(c). Specifically, the appellant argued that *Anonymous Attorney A* added recklessness as a new element. We held that *Anonyymous Attorney A* did not create a new standard of law. *Surrick,* 749 A.2d at 445. Our rationale was that there was no precedent that restricted the scienter requirement to intentional acts, and, prior to *Anonymous Attorney A,* it had been foreseeable that we would find that the rule defined professional misconduct to include misstatements made with reckless disregard for the truth or falsity of the contents. *Id.*

757 A.2d at 847-48 (footnote omitted).

[11] *See* text, *supra*, p. 16.

Anonymous Attorney A should not be given retroactive application[12]). In its recent discussion, in *Fiore v. White,* 562 Pa. 634, 757 A.2d 842 (2000), of the difference between an opinion that constitutes a "new rule of law" and an opinion that "merely clarifie[s] existing law," *id.* at 847-48, the Pennsylvania Supreme Court expressly reaffirmed its assignment of *Surrick* to the latter category.[13] Nonetheless, the court's discussion also cited *Surrick* first in a string citation of cases supporting the following pronouncement:

> Not every opinion creates a new rule of law. Generally, where we have yet to rule explicitly on an

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[12] *See* footnote 8, *supra.* In its *Surrick* opinion, in the course of detailing the procedural history of the case, the Pennsylvania Supreme Court noted that it had "remanded the matter to the Disciplinary Board on April 14, 1998, directing the Board to review the actions of respondent in accordance with this court's opinion in [*Anonymous Attorney A*]." 749 A.2d at 443. It appears, however, that the court's decision in *Anonymous Attorney A* was not rendered until July 8, 1998, nearly three months after the remand order and almost a month after the Chair of the Disciplinary Board entered the order setting the matter down for reargument. Indeed, the court's remand order and the Board Chair's reargument order both refer to "further proceedings in accordance with *Office of Disciplinary Counsel v.* [*Anonymous Attorney A*] No. 28 DB 95" *i.e.*, the opinion of the Disciplinary Board that was the subject of the Pennsylvania Supreme Court's review in *Anonymous Attorney A* – not to "further proceedings" in accordance with the opinion of the Pennsylvania Supreme Court.

[13] *See* footnote 10, *supra.* The Pennsylvania Supreme Court's opinion in *Fiore v. White* was a response to a question certified to the court by the United States Supreme Court, *Fiore v. White,* 528 U.S. 23, 29, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999), in connection with its review of a federal habeas corpus case brought by a Pennsylvania prison inmate challenging a Pennsylvania conviction; on the basis of the Pennsylvania Supreme Court's response, the United States Supreme Court has completed its disposition of the habeas case. *Fiore v. White,* 69 U.S.L.W. 4066 (2001).

> unresolved legal issue, the first decision providing a definitive answer announces a new rule of law. . . . Then this Court issues a ruling that overrules prior law, expresses a fundamental break from precedent, upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent, this Court announces a new rule of law.

757 A.2d at 847.

It appears to us that, given what the Pennsylvania Supreme Court in *Anonymous Attorney A* acknowledged to be "the absence of precedent in Pennsylvania," 714 A.2d at 406, it is hard to escape the conclusion that in *Anonymous Attorney A* the court – to employ the *Fiore v. White* formulation – "decide[d] an issue of first impression, not clearly foreshadowed by precedent," and hence "announce[d] a new rule of law."

We recognize, of course, that the Pennsylvania Supreme Court has held to the contrary. That is to say, its *Surrick* opinion expressly recites that "*Anonymous Attorney A* did not create a new legal standard." 749 A.2d 441. And that settles the issue as a matter of Pennsylvania law. But it does not settle for this court the federal due process question whether it was fundamentally unfair for the Commonwealth of Pennsylvania, through its highest court, in 2000, to suspend Mr. Surrick from the practice of law for five years because of actions taken at a time – nearly eight years before the court's decision – when there was an "absence of precedent in Pennsylvania" that his actions were sanctionable. On the criminal side of the docket, the *ex post facto* clause bars the imposition of punishment for conduct not denominated as criminal at the time the conduct took place. On the civil side of the

docket, by contrast, the developing common law not infrequently applies norms not readily anticipatable at the time of the transaction at issue; but if, on occasion, substantial reliance on earlier norms is demonstrable, due process may require the common law to stay its hand as to past events, claiming its dominion *in futuro.* To which category do attorney disciplinary proceedings belong? The answer is – neither, or both. "These are," we are authoritatively advised, "adversary proceedings of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). In short, the claim that Mr. Surrick's license to practice law cannot constitutionally be suspended for several years for conduct whose prohibited contours were not clearly demarcated at the time Mr. Surrick acted, is, in our view, not clearly established nor yet clearly refuted.

And so we look elsewhere for the factors that control our disposition of this matter. We look to the other facet of respondent's due process claim – namely, the contention that the application of *Price* to respondent's disciplinary proceeding violated procedural due process. *Price,* it will be recalled, established for RPC 3.3(a)(1) and RPC 8.2(b) a regime governing the burden of proof and the standard of proof more onerous for the accused attorney than had theretofore governed the litigation processes of the Disciplinary Board. In *Surrick,* the Pennsylvania Supreme Court concluded that the same procedural regime should govern the processing of charges under RPC 8.4(c) – the only charges that remained of the litany of charges (including charges under RPC 3.3(a)(1) and RPC 8.2(b)) originally deployed against respondent Surrick. We see no ground for questioning the court's judgment that the *Price* procedural regime was properly transferable to RPC 8.4(c)

proceedings. But, from a due process perspective, we find it gravely problematic that the court applied its new procedural regime ("The burden then shifts to respondent to establish that the allegations are true or that following a reasonably diligent inquiry, he had formed an objectively reasonable belief that the allegations were true." 749 A.2d at 444) to an evidentiary record developed on the understanding that it was up to the Office of Disciplinary Counsel to shoulder the burden of proof. The profundity of the problem is placed in sharp relief by the following colloquy between this panel and prosecuting counsel that took place at oral argument:

> Judge PADOVA:
>
> . . . Well, doesn't due process require[,] under these circumstances, Mr. Surrick to have had the opportunity to present evidence under a newly-formed burden of proof? . . .
>
> Mr. BURGOYNE:
>
> And our argument is, that at the time he addressed the applicability of *Price* was the time to raise those issues of remand, new hearing, providing the opportunity to address those issues. But the opportunity to be heard was on the issue of what to do about that.
>
> Judge PADOVA:
>
> . . . The opportunity to be heard was an opportunity to be heard as to what the governing principles of law should be with respect to objective standards of proof. It wasn't an opportunity to . . . present evidence under a new burden of proof.

Mr. BURGOYNE:

Not present evidence, but to present argument, why evidence should be heard at another hearing.

Judge PADOVA:

So – well that's a waiver argument then.

Mr. BURGOYNE:

It's – it's, essentially, a waiver argument.

Judge PADOVA:

Because – I mean, you agree there was never any opportunity for Mr. Surrick in this case at any time to present evidence – to conduct his defense – under the burden – the new burden of proof – never an opportunity?

Mr. BURGOYNE:

Since he did not have the hearing, I can't disagree with that.

Transcript of Proceedings

September 20, 2000, pp. 38-39.

The coda to this colloquy is supplied by the concluding words of the United States Supreme Court in its opinion in *In re Ruffalo,* 390 U.S. 544, 552, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), more than three decades ago, reversing a decision of a federal court of appeals removing an attorney from membership in its bar on the basis of a judgment of a state supreme court indefinitely suspending the attorney from practice: "This absence of fair notice as to the reach

of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

Of course, in Mr. Surrick's case there is the possibility that the "waiver argument" relied on by prosecuting counsel in the quoted colloquy might – arguably – be deemed marginally adequate to shield the state proceedings, culminating in Mr. Surrick's five-year suspension from the bar, from due process challenge. Whether that could be the case we need not determine. That is to say, we find it unnecessary to determine whether – taking into account the slender reed of asserted 'waiver' – the state disciplinary proceedings were, taken in the aggregate, so fundamentally flawed as to yield the conclusion that "the [state] procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." Rule II(D)(1), Rules of Disciplinary Enforcement, United States District Court for the Eastern District of Pennsylvania. Even if Mr. Surrick could be found, as a matter of Pennsylvania law, to have 'waived' his due process rights, codified in Rule II(D)(1), to "notice" and "opportunity to be heard," Mr. Surrick has not waived his right to be treated fairly by this court. And it is clear to us that the processes of charge and proof that obtained in the state proceedings, even if constitutionally sufficient for the purposes of the Commonwealth, have not built a record and led to a judgment on which this court, in the performance of its independent responsibility to determine whether discipline should be imposed on a member of our bar, can confidently rely. We take as our guide in this respect Justice Harlan's concurring opinion in *Ruffalo:*

> I see no need to decide whether the notice given petitioner of the charge that formed the basis of his subsequent federal disbarment was adequate

> to afford him constitutional due process in the state proceedings. For I think that *Theard v. United States,* 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342, leaves us free to hold, as I would, that such notice should not be accepted as adequate for the purposes of disbarment from a federal court. On that basis, I concur in the judgment of the Court.

Ruffalo, 390 U.S. at 552.

Having determined that the state disciplinary proceedings resulting in the imposition of severe discipline upon respondent Surrick do not provide a proper basis for this court to impose discipline, we find it unnecessary to consider the other grounds he has urged for not conforming our judgment to that of the Pennsylvania Supreme Court – namely, the contention that the state proceedings were marked by an "infirmity of proof" and the contention that the imposition of discipline on Mr. Surrick was a constitutionally impermissible response to his exercise of his First Amendment right of free speech.[14]

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[14] Given our conclusion that the record made in the state proceedings does not provide a basis on which this court can properly impose discipline, we have no occasion to consider whether the severity of the sanction imposed on Mr. Surrick in the state proceedings was disproportionate to the offenses attributed to Mr. Surrick. But we note that, on oral argument, when Judge Dalzell inquired of prosecuting counsel, "In eighteen years [the period in which counsel had served in the Office of Disciplinary Counsel], can you cite me any other Pennsylvania case, where a lawyer, who filed a motion to recuse got a five-year suspension for doing that?", Mr. Burgoyne replied, "I can't cite you another case, no."

We would also note an additional problem which, in view of our disposition of this matter, need not be explored. The problem is

(Continued on following page)

presented by the fact that Mr. Surrick was found by the Disciplinary Board, and, ultimately, by the Pennsylvania Supreme Court, to have violated RPC 8.4(c), notwithstanding that charges arising under RPC 3.3(a)(1) and RPC 8.2(b), based on the same conduct (namely, the filing of the recusal motion), had been dismissed. Such a result appears to be in tension with guidance contained in the American Law Institute's recently adopted RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS. Appended to the black-letter § 5 [Professional Discipline] there is an extended Comment; paragraph *c* of the Comment states, in pertinent part:

> *General provisions of lawyer codes.* Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983)) or "in conduct that is prejudicial to the administration of justice" (*id.* Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent (see Comment *h*) and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the "appearance of impropriety" principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.
>
> No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule.

1 Restatement of the Law: The Law governing Lawyers (2000) 50.

(Continued on following page)

For the reasons given above, we conclude that Mr. Surrick has shown cause that discipline should not be imposed on him by this court.

RECOMMENDATION

AND NOW, this 7th day of February, 2001, for the reasons stated in the accompanying Report, it is hereby recommended that discipline not be imposed on Robert B. Surrick.

DALZELL, J., *concurring*.

February , 2001

While I without reservation join in, and could not improve upon, Judge Pollak's opinion for our panel on the due process issue, I write separately to highlight another important constitutional concern this case implicates.

In two Delphic references in the text of Surrick's brief[15], his able lawyer raised the First Amendment as an issue but then elected not to press it. As a result, I do not dissent from our failure to consider the First Amendment in the panel's opinion.

Our taking of Surrick at his advocate's word on this point should not, however, be construed as representing a

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The problem the American Law Institute describes is, of course, one of disciplinary policy, not of federal right. But fashioning disciplinary policy is a matter of concern for federal courts as well as for state courts.

[15] *See* page 6 referring to the First Amendment explicitly, and pages 24-25 alluding to "speech" but not the "First Amendment", and one in footnote 9 on page 23 (citing, among other cases, *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

unanimous view that this concern is not at stake. Those interests are to me suggested in the Supreme Court's words in *Times v. Sullivan,* 376 U.S. at 279, 84 S.Ct. at 725:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to ... 'self-censorship.' ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

See also NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963) ("First Amendment freedoms need breathing space to survive").

While a courtroom is, to be sure, not a free speech zone on the order of a public square or the Internet, neither is it an alien place to core First Amendment values, as this case illustrates. Judges are public figures and their impartiality and ethics are matters of profound public concern.[16] Lawyers are the sentries for the public when they detect

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[16] *See 22 Judicial Conduct Reporter* 4, 6-7 (Summer, 2000), reporting that between 1980 and the end of 1999 no less than 266 state court judges had been removed from office as a result of discipline proceedings. Indeed, in 1999 alone, two of thirteen judges were removed because of *ex parte* communications. *See Mississippi Commission on Judicial Performance v. Jenkins,* 725 So.2d 162 (Miss.1998); *Mississippi Commission on Judicial Performance v. Spencer,* 725 So.2d 171 (Miss.1998). It is well past the time in Pennsylvania when one could reflexively attribute such improper communications to lawyers' hyperactive imaginations. *See, e.g., Yohn v. Love,* 887 F.Supp. 773 (E.D.Pa.1995), *aff'd in part* 76 F.3d 508 (3d Cir.1996).

judges' breaches of these minimal standards. In that role, lawyers must have *some Times*-like "breathing space". Here, where a lawyer's loss of a recusal motion has meant the loss of his job for five years – an apparently unprecedented sanction on lawyer recusal speech in Pennsylvania – that breathing space has disappeared for him and, through him, for all Pennsylvania lawyers. Surrick's professional catastrophe is thus of grave First Amendment moment for the bar and the public.

Although motions to recuse therefore can, in my view, implicate core First Amendment interests, I say no more on this subject because Surrick himself has not invited action from us based upon this crucial part of our Constitution.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : MISC. NO. 00-086
ROBERT SURRICK :

ORDER

(Filed Apr. 2, 2001)

AND NOW, this 2nd day of April, 2001, after consideration of the Report and Recommendation of the three judge panel of this Court dated February 7, 2001, and the appended concurring opinion, and the record in this matter, and the Court having voted not to adopt the Report and Recommendation or the concurring opinion, it is hereby ORDERED that the Report and Recommendation and the appended concurring opinion are marked NOT ADOPTED.

Further, the Court, having determined that it will only give further consideration to the question of whether identical discipline to that imposed by the Pennsylvania Supreme Court through its Opinion and Order dated March 24, 2000 should be imposed by this Court, under Rule 83.6II(D)(4) of this Court's Local Rules of Civil Procedure (promulgated and codified under Rule 83.6 of this Court's Local Rules of Civil Procedure), it is ORDERED that, within seven (7) days of the entry of this Order, respondent shall notify the Court in writing whether he seeks relief under Rule II(D)(4), which is

premised upon misconduct established,[1] without prejudice to, and without repetition of, the other contentions raised in his Answer to the Show Cause Order of May 9, 2000.

In the event respondent elects to proceed under Rule II(d)(4), he is hereby granted leave to supplement the record consistent with the limitations of this Order, within two (2) weeks of the entry of this Order, and, if deemed appropriate, to request a hearing on the mattes supplemented. In that event, Petitioner is hereby granted leave to file a written response to Respondent's submission within two (2) weeks after it is served with any copy of respondent's submission. All submissions shall be filed under seal.

BY THE COURT:

/s/ James T. Giles
C.J.

4/2/01

[1] Rule II(D)(4) provides, *inter alia*, that the Court shall impose identical discipline unless it clearly appears from the face of the record " . . . that the misconduct established is deemed by this court to warrant substantially different discipline."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2783

IN RE:
ROBERT B. SURRICK,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 00-mc-00086)
District Judge: Honorable James T. Giles

Argued December 18, 2002

Before: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, AMBRO, BARRY, FUENTES, SMITH, CHERTOFF and COWEN*, *Circuit Judges*

ORDER

The petition for rehearing *en banc* filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in

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* Honorable Robert E. Cowen, Senior Third Circuit Judge, vote limited to panel rehearing only.

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/
Circuit Judge

Dated: SEP 22 2003